LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 405

IN THE MATTER OF LEE ROY MURCHISON AND JOHN WHITE, PETITIONERS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI FILED OCTOBER 14, 1954

CERTIORARI GRANTED DECEMBER 6, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 405

IN THE MATTER OF LEE ROY MURCHISON AND JOHN WHITE, PETITIONERS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

INDEX

	Original	Print
Proceedings in the Supreme Court of the State of Michigan in the matter of Lee Roy Murchison	a	1
Docket entries	a	1
Notice of settlement (omitted in printing)	1	
Application for leave to appeal re Lee Roy Murchison	2	2
Concise statement of facts and proceedings	5	4
Exhibits B & C—Photographs (omitted in printing)	10	
Exhibit A—Order to show cause	12	7
Exhibit D—Opinion, O'Hara, J.	15	9
Judge's certificate to settlement of case	48	29
Objections of petitioner to the proposed concise statement of facts and proceedings	49	29
Exhibit E to the concise statement of facts and proceedings—Transcript of proceedings of the Recorder's Court for the City of Detroit, May 10, 1954	51	30
Appearances	51	30
Statement of the Court	53	31
Colloquy between court and counsel	54	32
Plea of not guilty and withdrawal thereof	64	37

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JAN. 20, 1955

—9725

	Original	Print
Exhibit E to the concise statement of facts and proceedings—Transcript of proceedings of the Recorder's Court for the City of Detroit, May 10, 1954—Continued		
Testimony of Fred Heath	67	39
Claude Ingersoll	86	51
Offers in evidence	102	60
Testimony of Bernice Gough	103	61
Fred Heath (recalled)	115	69
Claude Ingersoll (recalled)	124	74
Colloquy between court and counsel	127	75
Testimony of Claude Ingersoll (recalled)	131	78
Colloquy between court and counsel	135	80
Exhibit F to the concise statement of facts and proceedings—Transcript of proceedings of the Recorder's Court for the City of Detroit, May 12, 1954	140	83
Appearances	140	83
Colloquy between court and counsel	141	83
Exhibit G to the concise statement of facts and proceedings—Transcript of proceedings of the Recorder's Court for the City of Detroit, May 14, 1954	155	91
Appearances	155	91
Colloquy between court and counsel	157	91
Testimony of Claude Ingersoll (recalled)	158	92
Colloquy between court and counsel	173	101
Sentence	179	105
Stenographer's certificate (omitted in printing)	183	
Order granting application for leave to appeal (omitted in printing)	184	
Argument and submission (omitted in printing)	185	
Opinion, Boyles, J.	186	107
Judgment	191	111
Petition for stay of proceedings; motion for rehearing and brief in support of motion for rehearing	191b	111
Order granting motion for a stay of proceedings	192	124
Order allowing and setting the amount of bail	193	124
Minute entry of submission of motion for rehearing	194	125
Order denying motion for rehearing	195	125
Order staying proceedings	196	126
Clerk's certificate (omitted in printing)	197	
Proceedings in the Supreme Court of the State of Michigan in the matter of John White	198	127
Docket entries	198	127
Notice of settlement (omitted in printing)	199	
Application for leave to appeal re John White	200	127
Memorandum brief of petitioner	204	130

	Original	Print
Concise statement of facts and proceedings and judge's certificate to settlement of case	207	133
Exhibit A—Order to show cause	211	136
Exhibit A—Transcript of proceedings of the Recorder's Court for the City of Detroit, May 21, 1954	247	138
Testimony of John J. White	248	138
Stenographer's certificate (omitted in printing)	259	
Exhibit C—Transcript of proceedings of the Recorder's Court for the City of Detroit, May 28, 1954	260	145
Appearances	260	145
Offer in evidence	263	147
Motions that the order to show cause be dismissed and that this matter be transferred to some other judge	266	148
Colloquy between court and counsel	267	149
Court's ruling re jurisdiction of court to hear this matter	313	174
Sentence	318	177
Offer in evidence	322	179
Stenographer's certificate (omitted in printing)	325	
Exhibit B—Transcript of proceedings of the Recorder's Court for the City of Detroit, May 24, 1954	326	181
Appearances	326	181
Testimony of John J. White (omitted in printing)	330	
Order granting application for leave to appeal	348	182
Argument and submission	349	182
Judgment	350	183
Opinion, Sharpe, J.	351	183
Petition for stay of proceedings; motion for rehearing and brief in support of motion for rehearing	373	200
Order granting motion for stay of proceedings	380	204
Order allowing and setting the amount of bail	381	205
Minute entry of submission of motion for rehearing	382	205
Order denying motion for rehearing	383	206
Order staying proceedings	384	206
Clerk's certificate (omitted in printing)	385	
Order granting certiorari	386	207

[fols. a-1]

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

46218

Parties: In the Matter of Lee Roy Murchinson

Plaintiff's Attorneys: Frank G. Millard, Gerald K. O'Brien, Samuel J. Toriia.

Defendant's Attorneys: Charles W. Jones, William L. Colden, George Stone.

Appeal from Recorder's Court of Detroit.

Docket Entries

Date
1954

June 7. Stipulation filed.
June 4. Application for leave to appeal filed.
June 9. Application granted.
June 15. Argued and submitted.
July 6. Affirmed.
July 22. Motion for stay of proceedings.
July 22. Motion granted—bail $3000.
July 31. Bond filed.
Sept. 1. Motion for rehearing submitted.
Sept. 8. Motion for rehearing denied.
Sept. 14. Motion for stay of proceedings filed.
Sept. 14. Motion granted—bail $3000.
Sept. 22. Bond filed.

[fol. 2] IN THE SUPREME COURT OF MICHIGAN

No. —

[Title omitted]

APPLICATION FOR LEAVE TO APPEAL—Filed June 4, 1954

The above named petitioner, Lee Roy Murchinson, respectfully shows unto the Court as follows:

1. That he is a resident of the City of Detroit, Wayne County, Michigan and for some years past has been a member of the Police Force of said City of Detroit.

2. That for some months prior hereto there has been pending in the Recorder's Court for the City of Detroit a so-called Grand Jury investigation under Sections 28.941 et seq. M. S. A. as amended, and that the Honorable John P. O'Hara, Judge of said Recorder's Court has been the so-called one man grand juror in charge of such proceedings.

3. That petitioner was subpoenaed before such grand jury and required to testify before it with respect to certain matters.

4. That thereafter on May 6, 1954, Judge O'Hara, as the one man grand juror, issued an order requiring petitioner to show cause why he should not be "punished for criminal contempt of this court" because he had testified falsely before it.

5. That after a hearing on said order to show cause before Judge O'Hara, petitioner was found guilty on May 14, 1954 of contempt of court and sentenced to be confined in the Wayne County Jail for a period of 60 days.

6. That petitioner has been released on bail fixed by Judge O'Hara pending the outcome of this application for leave to appeal.

7. That petitioner believes he was wrongfully and erroneously convicted, that prejudicial error was committed by the trial court in his conviction, and that the proceedings [fol. 3] before Judge O'Hara are unconstitutional and void, and that the reasons and grounds for his appeal are as follows:

(a) The so called one-man grand jury statute, sections 28.941, et seq., M. S. A., constitutes an unlawful

delegation of legislative and executive functions to a judicial officers in violation of Article IV of the Constitution of 1908 of Michigan.

(b) The one-man grand jury statute deprives persons of their liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(c) The one-man grand jury statute deprives persons called before it to testify of the right to have counsel with them in violation of the Constitution of the United States and the Constitution of the State of Michigan.

(d) The contempt hearing before the same judge who is at the same time the complainant, indicter, and prosecutor constitutes a denial of due process of law and of the fair and impartial trial required by the Fourteenth Amendment to the Constitution of the United States.

(e) The contempt hearing before Judge O'Hara is in violation of both the letter and the spirit of the one-man grand jury statute, particularly sections 28.944 and 29.945, M. S. A., as amended by Act 276, P. A. 1951.

(f) The procedure adopted by Judge O'Hara denies to petitioner the rights of a criminal trial, including the right to a trial by jury.

(g) The allegedly false swearing before Judge O'Hara, while it might subject petitioner to a charge of perjury, does not constitute contempt of court.

8. That in support of this application there is attached hereto a concise statement of the proceedings and facts in the court below so far as material to this application.

Petitioner therefore prays that this court grant him leave to appeal from the judgment and sentence of Judge O'Hara [fol. 4] finding him guilty of contempt of court and ordering him confined in the Wayne County Jail for 60 days, that the errors aforesaid may be corrected and a proper judgment entered in accordance with his lawful rights.

——— ———, Petitioner.

George Stone, James Jackson, Sr., William L. Colden and George Stone, Attorneys for Petitioner, by George Stone, 2550 Guardian Bldg., Detroit 26, Michigan. WO. 1-5364.

[fol. 5] IN THE SUPREME COURT OF MICHIGAN

[Title omitted]

CONCISE STATEMENT OF FACTS AND PROCEEDINGS

On March 16, 1954, there was filed in the Recorder's Court for the City of Detroit, a position requesting a Grand Jury investigation under Sections 28.941 et seq., M. S. A., as amended, in miscellaneous cause number 79821 entitled as follows:

> "In the Matter of the Application of Gerald K. O'Brien, Prosecuting Attorney for the County of Wayne, for a Judicial Investigation into the Operations of Numbers Syndicates and the Relation of Certain Police Officers Therewith."

On March 16, 1954, the application was considered by the entire bench of Recorder's Court, the application was granted and the Honorable John P. O'Hara, one of the Judges of Recorder's Court, was selected to conduct the grand jury investigation.

In the course of the investigation conducted by Judge O'Hara, petitioner, Lee Roy Murchison, a member of the police force of the City of Detroit, was subpoenaed as a witness. In response to the subpoena, petitioner did appear and testified before the grand jury.

On May 6, 1954, Judge O'Hara, acting as the one man grand jury, issued an order to show cause directed to peti-[fol. 6] tioner requiring him to show cause why he should not be "punished for criminal contempt of this Court" because he had testified falsely by denying he had at any time, and specifically on the 9th day of March, 1954, visited the residence of said Edward Stephen. A copy of the order to show cause is attached hereto as Exhibit A.

The order to show cause of May 6, 1954, was returnable on May 10, 1954, at which time petitioner objected to any further proceedings against him on the ground that the one man grand jury statute was unconditional and void; that Judge O'Hara, the one man grand juror could not constitutionally hear and determine the guilt or innocence of petitioner on the contempt hearing; and that further pro-

ceedings by him were prohibited by the terms of the grand jury statute, Sections 28.944, 28.945 M. S. A., as amended by Act 276 P. A. 1951.

Judge O'Hara, the one man grand jury, over-ruled the objections of petitioner and forthwith proceeded with the hearing on said order to show cause. Testimony on behalf of the People was taken, the hearing held in part and then adjourned to May 12, 1954. At the adjourned hearing on May 12, 1954, petitioner did not interpose any defense by way of evidence but relied on his legal objections as above set forth. The witnesses were all interrogated by Joseph C. Rashid, Assistant Prosecuting Attorney for Wayne County in open court.

Bernice Gough, the court reporter who took the previous testimony of Officer Murchison, was sworn as a witness and [fol. 7] testified to what had been stated by Officer Murchison with respect to his presence at the Stephen premises on March 9, 1954, and to the denial of Officer Murchison that he had ever been at the Stephen premises on March 9, 1954, or at any other time. Inspector Fred Heath and Lieutenant Claud Ingersoll, of the Detroit Police Department, were also sworn and they gave testimony of their personal acquaintanceship with and knowledge of Officer Murchison and his presence at the Stephen premises on March 9, 1954. Lieutenant Ingersoll also identified the photographs of Officer Murchison taken by him on March 9, 1954.

A copy of the official police department photograph of Officer Murchison was received in evidence as Exhibit 2 and is appended hereto as Exhibit B. Photographs of a man identified as Officer Murchison, taken on March 9, 1954, by Lieutenant Ingersoll, were introduced as Exhibits 1A, 1B, 3, 6, 7 and 8. The individual appearing in the latter six exhibits was identified by Inspector Heath and Lieutenant Ingersoll as respondent Lee Roy Murchison. All, except Exhibit 3, were taken by Lieutenant Ingersoll as Murchison stood on the Stephen porch at 945 St. Josafats Court on March 9, 1954. Exhibit 3 shows Murchison as he left the Stephen premises. The pictures, Exhibits 1A, 1B, 3, 6, 7 and 8 are appended to this concise statement as Exhibit C.

A complete transcript of proceedings on May 10, May 12, and May 14, 1954, is also made part hereof as Exhibits E, F, and G, respectively.

[fol. 8] James Jackson, cross examined witnesses Gough, Heath and Ingersoll at length. At the close of the testimony on May 10, 1954, Mr. Jackson stated he would produce witnesses from Shrewsbury, Canada, to prove Officer Murchison was at that place on March 9, 1954. The hearing was adjourned from May 10, 1954, to May 12, 1954, to give Mr. Jackson an opportunity to present testimony on behalf of his client. On May 12, 1954, when court convened on the matter again, Mr. Jackson offered various objections to the proceedings, and stated that he did not desire to offer any testimony on behalf of Officer Murchison.

Mr. Jackson was asked by the court whether he wished to present any legal argument in support of his contentions. No brief was filed on behalf of respondent Murchison by Mr. Jackson, and no legal argument beyond quoting the statute, Sec. 28.944 M. S. A. was presented to the court.

The contempt hearings on May 10, 1954, May 12, 1954, and May 14, 1954, were held in open court. The front door of the court room was opened wide so that any person desiring to enter could do so. At various times during the hearings many attorneys and other persons were present in the courtroom, including representatives of the press.

Judge O'Hara made his determination, found petitioner guilty of contempt of court, and sentenced him to be confined in the Wayne County Jail for a period of 60 days.

[fols. 9-11] At the time of sentence, Judge O'Hara also fixed bond for petitioner in the amount of $2,000, with no surety, pending application for leave to appeal his sentence to the Supreme Court. Such bond has been filed and approved by the court and petitioner is now at liberty on bail.

Judge O'Hara filed an opinion in which he over-ruled the objections of petitioner. A copy of such opinion is attached hereto and marked Exhibit D.

[fol. 12] True Copy: E. Burke Montgomery, Clerk Recorders Court. Per E. Reiba, Special Deputy Clerk.

EXHIBIT A TO CONCISE STATEMENT OF FACTS AND PROCEEDINGS

STATE OF MICHIGAN:

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

No. 79821. Miscellaneous

In the Matter of the Application of GERALD K. O'BRIEN, Prosecuting Attorney for the County of Wayne, for a Judicial Investigation Into the Operations of Numbers Syndicates and the Relation of Certain Police Officers Therewith

At a Session of said Court held in the Municipal Court Building, Detroit, Michigan, on Thursday, May 6, 1954.

Present: The Honorable John P. O'Hara, Judge of Recorder's Court and Grand Juror.

ORDER TO SHOW CAUSE

This court having heretofore convened in this cause in accordance with the statute in such cases made and provided, for the purpose of conducting a judicial investigation into certain crimes, offenses and misdemeanors set forth in the order of the court, it became and was a material question to this judicial inquiry whether or not certain police officers of the City of Detroit and other persons frequented or went to the residence of a known and notorious numbers operator, to-wit, one Edward Stephen, said residence being known as 945 St. Josafats Court in the City of Detroit;

That Petrolman Lee Roy Murchinson having been duly [fol. 13] called before the court as a witness in the said judicial inquiry on the 7th day of April, 1954, and was then and there duly sworn; that the said Patrolman Lee Roy Murchinson, contriving and intending to prevent the due course of justice, then and there as a witness in said judicial inquiry, upon his oath aforesaid, falsely, corruptly, knowingly, and wilfully, did depose and swear, among other things, in substance and to the effect as follows: that he, the said Patrol-

man Lee Roy Murchinson at no time in the month of March, 1954, went to the said residence of Edward Stephen, the same being 945 St. Josafats Court, that he the said Patrolman Lee Roy Murchinson at no time went to either the rear or front door at 945 St. Josafats Court; whereas, in truth and in fact the said Lee Roy Murchinson did walk to the front entrance of 945 St. Josafats Court on the 9th day of March, 1954, at approximately 8:40 A. M. and that having failed to gain entrance at the front door of said address he the said Patrolman Lee Roy Murchinson walked to the rear door where he rang the door bell.

All of which was then and there well known to the said Patrolman Lee Roy Murchinson.

It therefore appearing from the sworn testimony of Inspector Fred Heath and Lieutenant Claude Ingersoll, and the photographs taken of the said Patrolman Lee Roy Murchinson at said address on the time and date hereinabove set forth, that the said Patrolman Lee Roy Murchinson has been guilty of wilfull and corrupt perjury, which perjury has an obstructive effect upon the judicial inquiry being [fol. 14] conducted by this court and the said Patrolman Lee Roy Murchinson obstructed the judicial function of the court by wilfully giving false answers as aforesaid, and did also tend to impair the respect for the authority of the court, all of which perjury and false answers given by the said witness aforesaid was committed during the sitting of, in the presence and view of this court and constitutes criminal contempt;

It is therefore ordered that the said Patrolman Lee Roy Murchinson appear before this court on the tenth day of May, 1954, at 10:00 o'clock in the forenoon and show cause why he should not be punished for criminal contempt of this court because of his aforesaid acts.

It is further ordered that a true copy of this order be personally served upon the said Patrolman Lee Roy Murchinson four days before the time herein prescribed for his appearance.

John P. O'Hara, Judge of the Recorder's Court.

[fo. 15] True Copy: E. Burke Montgomery, Clerk Recorders Court. Per ——— ———.

EXHIBIT D TO CONCISE STATEMENT OF FACTS AND PROCEEDINGS

STATE OF MICHIGAN:

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

No. 79821-1. Miscellaneous

In Re: Contempt Proceedings Against Lee Roy Murchison

OPINION OF THE COURT

Question Involved: Is a Judge of the Recorder's Court for the City of Detroit Sitting as a Grand Juror under Sec. 28.943 M. S. A. et seq., Precluded by Provisions of Sec. 28.944, M. S. A. from Citing a Witness for Contempt and Hearing the Contempt Proceedings Himself Where the Alleged Contempt Arose in the Courts of the Grand Jury Investigation and in the Presence of the Court.

FACTS

Prior to March 15, 1954, officers of the police department of the City of Detroit observed for some time activities around premises known as 945 St. Josaphats Court, Detroit, which was the home of Edward "Indian Steve" Stephen. The observations were the result of complaints made to the police department by neighbors concerning the numerous policemen and other individuals visiting this address.

On March 15, 1954, police officers of the City of Detroit [fol. 16] conducted a raid upon the premises under observation and arrested a number of individuals found on the premises and seized a quantity of gambling paraphernalia, mutuel bet slips, tapes, and cash found in the premises.

On March 16, 1954, as a result of the developments growing out of the observations and raid on premises at 945 St. Josaphats Court, a petition by Gerald K. O'Brien, Prosecuting Attorney for the County of Wayne, was presented to the presiding judge of the Recorder's Court. A meeting of all

judges of the Recorder's Court was immediately called and the petition as well as the oral presentations of the Prosecutor, Commissioner Donald S. Leonard of the Detroit police department, and other police officers, were heard by the entire Bench. After a discussion of the allegations, a vote of the judges was taken and the petition was granted in accordance with Rule 38 of the Recorder's Court for the City of Detroit, which reads as follows:

> "Petitions for Grand Juries shall be presented to the Presiding Judge and by him submitted to the bench for a decision as to whether the petition shall be granted and a Grand Jury called. No Grand Jury shall be called except by affirmative majority action of the bench present. The Grand Juror shall be designated by a majority of the judges present at a meeting called for that purpose."

[fol. 17] This rule is in accordance with Sec. 28.943 M. S. A., which in part reads as follows:

> "Provided, that in any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court."

John P. O'Hara, one of the judges of the Recorder's Court for the City of Detroit, was unanimously appointed as the judge to conduct the inquiry, which by an order entered on March 16, 1954, was confined to police corruption in connection with gambling. On the following day he entered upon his duties and the investigation commenced immediately.

In the course of the investigation it became material to the inquiry to discover whether police officers had visited the Stephen premises at 945 St. Josaphats Court, and on April 7, 1954, Lee Roy Murchison, a Detroit policeman, was called as a witness before the Grand Juror. He was sworn to tell the truth, the whole truth and nothing but the truth. He was interrogated by Joseph G. Rashid, Assistant Prosecuting Attorney for the County of Wayne. Officer Murchison was asked how many times he had visited the premises at 945 St. Josaphats Court. He replied that he had never been there.

In response to a question as to how many times he went there in January of this year, he replied, "None". [fol. 18] In reply to a question as to how many times in March of this year, he replied, "None". In reply to a question as to how many times he had been there this year, he replied, "I haven't been there." He also stated, "I wouldn't even know exactly where 945 St. Josaphats would be." He was also asked if he saw a picture which showed how he went to the house, and rang the buzzer, if he would still deny it. He answered "That is not correct because I haven't been there." In response to further questions he said positively he didn't go there in the month of March and further that he had never been there, and, "I didn't go there. It must be a case of mistaken identity."

Testimony under oath taken before the Grand Juror of Inspector Fred Heath and Lieutenant Claude Ingersoll, of the Detroit police department, positively identified Officer Murchison as a person observed by them on the porch of the Stephen house at 945 St. Josaphats Court on the 9th day of March, 1954, shortly after 8:40 A. M. Inspector Heath identified Lee Roy Murchison as the policeman he saw on the porch on the day in question. He further testified he had known policeman Murchison in excess of five years, and that both of them at one time had been assigned to the Vice Bureau. Inspector Heath was shown a photograph of Officer Murchison which he identified and was also shown a picture taken by Lieutenant Claude Ingersoll on the morning of March 9, 1954, showing Officer [fol. 19] Murchison standing on the porch of the Stephen residence at 945 St. Josaphats Court. Inspector Heath identified Officer Murchison as the man in the picture taken by Lieutenant Ingersoll.

Lieutenant Claude Ingersoll, of the Detroit police department was also sworn as a witness. He testified he and Inspector Heath had previously been observing what occurred at the Stephen premises and that on the morning of March 9, 1954, about 8:40 A. M., he saw Officer Murchison walk east on St. Josaphats, go to the gate, walk up on the porch of 945 St. Josaphats, and ring the front door bell. He stated that he remained on the porch for possibly two minutes, then walked to the rear of the house where he again pushed the buzzer. He remained there for about

two minutes, then walked between the houses to the street where he walked west on St. Josaphats towards Hastings Street. Lieutenant Ingersoll stated that he had known Officer Murchison since 1944 or 1945, about ten years or longer, and that he had been assigned to the 13th Precinct Station where Officer Murchison worked. Lieutenant Ingersoll also testified that he took pictures with a movie camera of Officer Murchison standing on the front porch of the Stephen residence, several of which pictures were introduced into evidence and identified as Officer Murchison.

Thereafter on Thursday, May 6, 1954, Officer Lee Roy Murchison was served in court with an Order to Show [fol. 20] Cause on Monday, May 10, 1954, before the Grand Juror why he should not be adjudged guilty of contempt of court for falsely testifying to material facts before the court. On that day, Officer Murchison appeared together with James Jackson, who entered an appearance as Officer Murchison's attorney.

Mr. Jackson objected to the proceedings for the reason that the Grand Jury had no authority to hear contempt proceedings of the nature charged in the Order to Show Cause in view of the provisions of Sec. 28.944 M. S. A. The objection was overruled, and the court proceeded to take testimony.

The witnesses were all interrogated by Joseph G. Rashid, Assistant Prosecuting Attorney for Wayne County in open court.

Bernice Gough, the court reporter who took the previous testimony of Officer Murchison, was sworn as a witness and testified to what had been stated by Officer Murchison with respect to his presence at the Stephen premises on March 9, 1954, and to the denial of Officer Murchison that he had ever been at the Stephen premises on March 9, 1954, or at any other time. Inspector Fred Heath and Lieutenant Claude Ingersoll, were also sworn and they gave testimony of their personal acquaintanceship and knowledge of Officer Murchison and his presence at the Stephen premises on March 9, 1954. Lieutenant Ingersoll also identified the photographs of Officer Murchison taken by him on March 9, 1954.

[fol. 21] James Jackson, cross examined witnesses Gough, Heath, and Ingersoll at length. At the close of the testi-

mony on May 10, 1954, Mr. Jackson stated that he would produce witnesses from Shrewsbury, Canada, to prove Officer Murchison was at that place on March 9, 1954. The hearing was adjourned from May 10, 1954, to May 12, 1954, to give Mr. Jackson an opportunity to present testimony on behalf of his client. On May 12, 1954, when court convened on the matter again, Mr. Jackson offered various objections to the proceedings and stated that he did not desire to offer any testimony on behalf of Officer Murchison.

Mr. Jackson was asked by the court whether he wished to present any legal argument in support of his contentions. No brief was filed on behalf of respondent Murchison by Jackson and no legal argument beyond quoting the statute, Sec. 28.944 M. S. A., was presented to the court.

The contempt hearings on May 10, 1954, and May 12, 1954, were held in open court. The front door of the courtroom was opened wide so that any person desiring to enter could do so. At various times during the hearings, many attorneys and other persons were present in the courtroom, including representatives of the press.

The matter was then adjourned to Friday, May 14th, at 11:00 o'clock A. M.

[fol. 22] Law

In approaching the legal aspects of this matter it is first necessary to determine what the nature of a Judge of the Recorder's Court, sitting as a Grand Juror, is. In what capacity does he sit; as a creature of Grand Jury law, or as a judicial personage already in existence, clothed with judicial powers? If such a Judge does undertake a Grand Jury hearing as an existing judicial body, and not as a creature of Grand Jury legislation, then the next question is what powers with respect to contempts does an existing Judge of the Recorder's Court possess?

Question Number I: Is a grand juror a special creation of the Legislature, or is he a judicial person to whom an investigation is assigned by law?

This question has been raised many times, and it is now clear that a Judge acting as a Grand Juror functions judicially, that he is a Judge in the fullest concept of the

word, and not just an "inquisitor", as has been argued before, or merely an instrumentality for the detection of crime.

It is hardly necessary to go beyond one decision of this court which answers the question as fully and completely as could be desired. That is *In Re Slattery, 310 Mich 458*. A perusal of the record and briefs filed in this matter discloses that the character of a Grand Juror was as completely discussed and argued as in any matter where the question has arisen before the court. The voluminous briefs filed by the Respondent's attorneys and by amici curiae dealt with the question extensively, and persistently repeated that the [fol. 23] Grand Juror was only an inquisiter. The Court said (P. 465):

> "The statutes of this state invoked in the instant case serve the same purpose as the constitutional provisions in regard to grand juries in other jurisdictions. They do not impose non-judicial duties upon the judiciary, and are in strict conformity with the Constitution of this state (1908) which in Article VII, under the heading 'judicial department' makes due provision in regard to the judicial power. In Article VII, Section 18, under the heading 'conservator of the peace' it is stated that justices of the Supreme Court, circuit judges and justices of the peace shall be conservators of the peace within their respective jurisdiction. * * *"

Quoting from *Averill* v. *Parrott, 74 Mich 296*, the court said:

> "As such conservators, they had, when the Constitution took effect the authority to apprehend offenders against the criminal laws of the state, and to hold examinations, and commit, bind over, or hold to bail, as well as other authority exercised by conservators of the peace."

The Supreme Court said (P. 466):

> "The one man grand jury proceedings, in accordance with law, were instituted in the Circuit Court for the County of Ingham. When a complaint had been filed by the attorney general it became incumbent upon the

judge "as a circuit judge to make an investigation. He [fol. 24] was neither a prosecuting attorney, policeman, or detective. He had judicial duties to perform, and he proceeded in a judicial capacity. In order to dispel any doubt as to the finding of petitioner guilty of contempt, he proceeded to act as a circuit judge in regard to proceedings which he himself had conducted while acting as a one man grand jury."

The Court then cited twelve of its prior decisions in which the same question had been presented, and concluding, said, on page 467:

"So that there may be no further question, we hold that the judge conducting a one man grand jury proceeding is acting in a judicial capacity."

The foregoing sentence should put at rest this question in the State of Michigan. It is interesting to note that a Writ of Certiorari in the Slattery matter was denied by the Supreme Court of the United States, *325 US 876; 89 L. Ed. 1939.*

Question Number II: What are the judicial powers possessed by Judges of the Recorder's Court?

The Superior Court of Detroit, hereinafter referred to was established in 1873. The Recorder's Court of the City of Detroit was created by the Charter of the City of Detroit in accordance with *Act No. 55, Chapter 6, of 1857.* It was continued by *Act 326, Local Acts, 1883, Section 11 of the 1883 Act*, being *Section 27.3561 M.S.A.* "Jurisdiction" [fol. 25] reads as follows:

"The said recorder's court shall have original and exclusive jurisdiction of all prosecutions and proceedings in behalf of the people of this state, for crimes, misdemeanors, and offenses arising under the laws of this state, and committed within the **corporate limits** of the city of Detroit, except in cases cognizable by the police court of the city of Detroit, or by the justices of the peace of said city; and shall have power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this

act, and especially to issue all writs and process, *and to do all acts which the circuit courts of this state within their respective jurisdictions may, in like cases, issue and do by the laws of this state.*" (Emphasis supplied)

By Act 369 of the Public Acts of 1919 the powers of the Recorder's Court were supplemented and extended after referendum approval by the voters of the City of Detroit.

Under the Recorder's Court Act of 1883 jurisdiction was given to the Recorder's Court "to do all acts which circuit courts of this state within their respective jurisdictions may, in like cases, issue and do by the laws of this state." [fol. 26] The inherent power of Circuit Courts to cite and punish for contempts without interference from or dictation by the Legislature was established in *Langdon vs. Wayne Circuit Judge, 76 Mich 358.* The case involved the question whether a Circuit Judge could punish for contempt an act which was not included in the statutes then existing covering contempts. It was necessary to determine precisely whether a Circuit Court possessed inherent powers or whether those powers could be given by and taken away by the Legislature. The Supreme Court said (P. 367):

"The question of the jurisdiction of the circuit court for the county of Wayne to entertain the proceedings at all is the only one involved here.

"Jurisdiction, when applied to courts, is the power to hear and determine a cause or matter. *Courts of record in this State have inherent power to hear and determine all contempts of court which the superior courts of England had at the common law; and the statute has not undertaken to limit or prohibit their jurisdiction in the matter of contempts.* The statutes are in affirmation of the common-law power of courts to punish for contempts, and, while not attempting to curtail the power, they have regulated the mode of proceeding and prescribed what punishment may be inflicted.

"The statutes have dealt with the subject of contempts in two separate chapters. These were first enacted in their present shape in the revision of 1846, and [fol. 27] have "remained unchanged until the present time." (Emphasis supplied)

The Court also said (P. 371):

> "But does it follow that the court has no jurisdiction to punish, as for a contempt of court, a person who has interfered while the suit is pending, and endeavored to bring about a disagreement of the jury by bribery? Can it be said that such conduct is not calculated to defeat, impair, impede, or prejudice the rights or remedy of the party? The jurisdiction of the court does not depend upon the fact that the misconduct did actually produce such result. If the purpose was, by adaptation of the means to the end, to bring about a disagreement of the jury, such conduct was calculated to defeat or impair the rights and remedies of the party to the suit."

The inherent right of the court to punish for contempt was upheld.

The question as to the rights and powers of the Recorder's Court with respect to contempts is fully answered in *Nichols vs. Judge of Superior Court of Grand Rapids, 130 Mich 187.* An attorney was cited for contempt of court. A Writ of Prohibition was asked of the Supreme Court to avoid the proceedings for the reason the Superior Court had no jurisdiction of contempts. The Court went into the matter thoroughly. The Superior Court of Grand Rapids was established by the Legislature. It was not a constitutional court, [fol. 28] one created by the Constitution itself. The Supreme Court, like the Recorder's Court, was given power "to do all acts which the circuit courts of this state within their respective jurisdictions may, in like cases, issue and do by the laws of the State of Michigan." Since this language gave the powers of a Circuit Court a Constitutional court, the Supreme Court inquired into the powers of the Circuit Court. On page 192 it said:

> "The power to punish for contempt is essential to the due administration of the law, and to carry out the orders, decrees, and judgments of the court. * * *
>
> "It follows that if the circuit courts are clothed with the power to punish for contempts, and are not limited to the cases provided for in the statute, which was enacted under the Constitution of 1835, then the respond-

ent possesses the same power. The question, therefore, is again presented to this court, Have the circuit courts of this State the inherent power to punish for contempts, or are they subject to the control of the legislature? The question is an important one in the administration of the law. If the legislature can determine what acts shall constitute contempts in the circuit courts, it can abolish the power of such courts to punish for contempts. There is no middle ground; either the courts have the absolute control, under the Constitution, over contempt proceedings, or they have only such as the legislature may see fit to confer.

[fol. 29] "The language of this court in *Langdon* v. *Wayne Circuit Judges, 76 Mich., 367 (43 N. W. 310)* is a broad statement that this power is inherent in the circuit courts of this State to the full extent that it existed in the courts of England at the common law. This was an authoritative statement of the law, but seems not to have been so considered by the entire profession. The subject was again before the court *in Re Chadwick, 109 Mich. 588 (67 N. W. 1070).* We there cited many authorities from other courts holding the same view that was expressed in the Langdon case. We will not cite those authorities again, but content ourselves with this reference to them and with the citation of a few others."

The Supreme Court cited *Bradley vs. State, 111 GA 168,* and quoted the following:

"Where a court is established by the constitution, it is given all the powers usually possessed by all courts; and we will not construe another provision of the constitution so as to take away from the court a power which is essentital to its preservation, and to its accomplishment of the purposes for which it is created, unless constrained to do so by express words or necessary implication.

"The power to punish for contempts is as ancient as the courts, and antedates Magna Charta. Chief Justice Wilmot, nearly a century and a half ago, said of this power:

[fol. 30] " 'The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution. It is necessary incident to every court of justice, whether of record or not, to fine and imprison for contempt acted in the face of the court; and in Westminster Hall for contempts out of court stands on the same immemorial usage which supports the whole fabric of the common law. It is as much the lex terrae and within the exception of Magna Charta, as the issuing of any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges of its introduction, but can find none. It is as ancient as any other part of the common law. There is no priority or posterity to be found about it. It cannot, therefore, be said to invade the common law. It acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society.' "

The conclusion of the court in the Nichols case was that the Superior Court of Grand Rapids, even though a legislative court, possessed all of the powers of a circuit court, a constitutional court, to punish for contempt.

The Recorder's Court of the City of Detroit possesses the same powers that the Superior Court of Grand Rapids does. It has every power which circuit courts have to punish for contempt. Therefore, when the Legislature, in [fol. 31] enacting the One Man Grand Jury law, provided for a Judge of a court of record to act as a Grand Juror, it gave such right to a court already in possession of plenary powers to punish for contempt. The Recorder's Court now has the same complete power to punish for contempt as was and is possessed by the Circuit Court for the County of Wayne.

Question Number III: Could and Did the Legislature Deprive Courts of Record of their Inherent Powers to Punish for Contempt when a Restriction Upon such Power was Attempted in Section 28.944 M. S. A.?

Section 28.944 M. S. A. provides in part "that the Judge conducting the inquiry under *Section 4* of this

Act shall be disqualified from * * * hearing any charge of contempt under Section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Section 5, being *Section 28.945 M. S. A.* reads as follows:

"Same; failure of witness to appear or answer questions; penalty. Sec. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such judge may require as material to such inquiry shall be deemed guilty of a contempt and after a public hearing in open court and conviction of such contempt, shall be punished by a fine not exceeding $1,000.00 or imprisonment in the county jail not exceeding 1 year or both at the discretion of the court: Provided That if such wit- [fol. 32] ness after being so sentenced shall offer to appear before such judge to purge himself of such contempt, the judge shall cause such witness to be brought before him and, after examination of such witness, the judge may in his discretion commute or suspend the further execution of such sentence."

[fol. 33] In Michigan it has been held repeatedly from early days that the right to punish for criminal contempt is one possessed by the court independent of statute. It was said in re Dingley, 182 Mich. 50:

"The right of the court to punish as for a criminal contempt an offender is no longer an open question in this state. The power is conferred by statute (1 Comp. Laws, Sec. 1098; 5 How. Stat. (2d Ed.) Sec. 12589). The courts possess the power independent of the statute. Langdon v. Wayne Circuit Judges, 76 Mich. 358 (43 N. W. 310); In re Chadwick, 109 Mich. 588 (67 N. W. 1071); Nichols v. Judge of Superior Court, 130 Mich. 187 (89 N. W. 691), and the many authorities therein cited. These cases are also authority for the proposition that the issue is one for the court and not one for a jury."

In People v. Doe, 226 Mich. 5, it is said at page 19:

"The objection to the power to punish for contempt is in part answer by Mundy v. McDonald, supra, but it

is further insisted that the act in question makes provisions for punishment for contempt in certain cases and it is urged that this is to the exclusion of the power to punish in any other cases. The power to punish [fol. 34] for contempt is inherent in the court. It is a part of the judicial power. It is as firmly vested in the constitutional courts by the Constitution as is the exercise of any other judicial power. *That the exercise of judicial power and all of it can not be taken away from constitutional courts by the legislature is settled.*" (Emphasis supplied)

In Cobb v. State, 200 S. E. 796 (Ga.), 121 A. L. R. 210, the court said beginning on Page 213:

"The power to punish contempts is inherent in every court of record. If the court is created by the constitution, the legislature cannot, without express constitutional authority, define what are contempts, and declare that the court shall have jurisdiction over no acts except those specified. 2. The provisions of the constitution which declares that 'the power of the courts to punish for contempts shall be limited by legislative acts' does not confer such authority, but only the power to prescribe the punishment after conviction. Consequently, Section 4046 of the Civil Code, in so far as it seeks to limit the jurisdiction of a constitutional court to punish contempts to certain specified acts, is not binding upon such courts. They may go by beyond the provisions of the statute, in order to preserve and enforce their constitutional powers, [fol. 35] by treating as contempts, acts which clearly invade them."

Then it is interesting to note that Cobb v. State approves a similar holding in Bradley v. State, 111 Ga. 168, which was cited by the Supreme Court to support its similar holding in Nichols v. Superior Court of Grand Rapids, 130 Mich. 187.

The Cobb case is followed by an annotation on the power to punish for contempt. On Page 216 under "Legislative Power Denied," it is said:

"Without attempting to cite all of the decisions in which the general declaration has been made that

> the power to punish for contempt is inherent in a court and exists independent of statute, it may be stated that from the cases so holding the general rule follows that the legislature cannot abridge or destroy the judicial power to punish for contempt, since a power which the legislature does not give, it cannot take away."

The foregoing is followed by numerous citations, including Chadwick, 109 Mich. 588.

There being no doubt about the inability of the legislature to deprive a constitutional court of its power to punish for contempt, it follows that the provisions of Sec. 28.944, which restrict courts of record, including constitutional [fol. 36] circuit courts, in their power to punish for contempts must be void. Since it is void as to circuit courts of record, it is void in its entirety and that includes its application to the Recorder's Court.

This is clearly illustrated in Campau v. The City of Detroit, 14 Mich. 275. Judge Cooley wrote on Page 285:

> "A single section of the act of 1865 attempts to amend all three of these; and we know of no principle which would warrant us in selecting out portions of the section to stand unaffected by the constitutional infirmity of the remainder, when all parts relate to the same subject matter, and provide the successive steps to be taken in perfecting a single proceeding. See Quinlon v. Rogers, 12 Mich., 168; Groesbeck v. Seeley, 13 ID., 329."

Again, in *Hunt* v. *Wayne Circuit Judge*, 142 Mich. 93, the supreme court was called upon to decide the constitutionality of the juvenile court act of 1905. The act extended the jurisdiction of circuit court commissioners for certain counties beyond the powers of a circuit judge at chambers as limited by the constitution. This portion of the act was palpably unconstitutional and void. The court said:

> "Satisfied of the legislative intent and purpose, can [fol. 37] it be held that it may be disregarded, the provisions evidencing this intent eliminated, and the statute held to be for any purpose generally opera-

tive? It seems to me that every consideration forbids such a ruling. Unless the act can be held to be inoperative in counties where jurisdiction is given to probate courts and to circuit courts, it is unnecessary to discuss further the questions presented. We are obliged to say that the language of the act indicates, not only the purpose to provide for a uniform administration of the law, but for its general application in all territory not expressly excepted from its operation. Judicial power does not extend to the mutilation or amendment of the act necessary to give it any effect in any county."

[fol. 38] The Recorder's Court Was Created by a Vote of Two-thirds of the Members Elected to Each House of the Legislature as Required by the Constitution. The Power to Punish for Contempt Was Given in the Act. Can This Power Be Rescinded Except by a Like Two-thirds Legislative Vote?

The Recorder's Court has been established under the provisions of Section 1 of Article 7 of the Michigan Constitution of 1908, which reads as follows:

"Judicial power. Section 1. The judicial power shall be vested in one supreme court, circuit courts, probate courts, justices of the peace and such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general law, by a two-thirds vote of the members elected to each house."

The present Recorder's Court operating under the Recorder's Court Act of 1883 supplemented by the Municipal Court Act No. 369 of 1919, was authorized by a two-thirds vote of the members elected to each house of the legislature. The Recorder's Court continued to possess all powers given to circuit courts in the State of Michigan as outlined herein-[fol. 39] before. To amend or repeal the Recorder's Court Act or the Municipal Court Act would require the same vote which was necessary for their creation. No such action has ever been taken by the legislature and consequently the Recorder's Court possesses to the fullest extent the same

powers as a constitutional circuit court has with respect to contempt proceedings. If those powers may be abrogated, it stands to reason it cannot be done by inserting a provision in the law, which requires a vote of a majority of a quorum of the legislature. Powers which are so precious and inherent in the administration of courts should not be destroyed or frittered away except by action equal in numerical voting requirements to that by which such powers were created.

This identical question has been before the Supreme Court of this state several times.

In Stockdale vs. School District, 47 Mich. 226, a question of validity of school bonds was involved. One question was whether the school district possessed the power to take the rescinding action in question except by a two-thirds vote which was required to create the issue. The court said at page 228:

> "We think the moderator was correct in holding that a mere majority could not rescind the vote which had been required to be taken by a two-thirds vote, and had been so taken. The decree must therefore be reversed and a new decree entered, restricted as above [fol. 40] indicated."

In Whitney v. Village of Hudson, 69 Mich. 189, the court again had before it the question of whether a city charter requiring a two-thirds vote of the members of the common council to pass a resolution also required a two-thirds vote to reconsider or rescind the prior action. On Page 203 the Supreme Court, holding that the number required to rescind was exactly the same as the number required to pass an ordinance said:

> "It is claimed, also, by the defendants' counsel, that the vote to reconsider was not carried; that where, by statute, a vote of two-thirds is required to pass a resolution, it cannot be reconsidered or rescinded except by a two-thirds vote. This was declared to be the law in the case of Stockdale v. School District, 47 Mich. 226 (10 N. W. Rep. 349), where the motion was to rescind. And, where the body has adopted no rule regulating the practice upon motions for reconsideration, it is not perceived why the same ruling should not apply.

"The law requires a vote of two-thirds of the members of the body to pass the act in the shape it is in when the vote is taken. Two-thirds are satisfied with it as it then [fol. 41] reads, and no reason exists why a majority less than two-thirds can bring the resolution again before the body for the purpose of changing its features, or postponing action. There should be some stability in legislative action which is passed under the requirements of a law calling for a vote of two-thirds of its members, and it should remain as the two-thirds have passed it, unless the same number desire a further consideration of the measure."

The same question was again before the Supreme Court in Naegely v. City of Saginaw, 212 Mich. 460. The court upheld its previous decisions, saying on Page 538:

"Under the provisions of Section 6, tit. 3, of the charter, the resolutions authorizing the issue of bonds required a majority vote of all the members elect of the council. A corporate act which can only be taken by a majority vote of all the aldermen elect could not be rescinded except by a like vote. Stockdale v. School District, 47 Mich. 226; Whitney v. Village of Hudson, 69 Id. 189, 202. The resolution offered by Ald. Smith received but 14 votes, and did not prevail. It is unnecessary, therefore, to consider the veto power of the mayor, or the validity of the action taken at the special meeting held January 31."

[fol. 42] The same question again had the attention of the Supreme Court in City of Saginaw vs. Consumers Power Company, 213 Mich. 460. The court said at Page 469:

"We agree with counsel for the power company that an ordinance may not be repealed or amended without action of equal dignity to that required in its enactment. Chicago, etc., R. C. v. City of Chicago, 174 Ill. 439 (51 N. E. 596); 2 Dillon on Municipal Corporations (5th Ed.) Sec. 571."

In contending that the general, inherent, constitutional power possessed by the Recorder's Court to punish for con-

tempts was restricted by the provisions of Sec. 28.244 M. S. A., it must be argued that the repeal is strictly one by implication. Aside from the fact that any such restriction or repeal would necessarily have to be accomplished by a two-thirds vote of both houses of the legislature elect, is it possible to accomplish such a repeal or restriction by implication only?

The Supreme Court had the question of repeal by implication before it in In Re Simmons, 248 Mich. 298. This case involved a contempt proceeding in the Recorder's Court. The precise question was whether the power to punish for contempt previously possessed by the court had been taken away by an implied repeal. Answering in the negative, the Supreme Court on page 301 said:

> [fol. 43] "Defendant challenges the jurisdiction of the court, in that the acts charged as contempt, 'not being within the immediate view and presence of the court and directly tending to interrupt its proceedings, or to impair the respect due to its authority,' are not within the statute, 3 Comp. Laws 1915, Sec. 12268, defining contempts punishable by courts of record.
>
> "This statute is part of the judicature act (No. 314) of 1915. With only slight changes of language, it is substantially a merger and re-enactment of two former statutes of long standing (2 Comp. Laws 1857, Sec. 4053, 4074), the criminal contempt parts of which were not designed to limit or prohibit jurisdiction but were in affirmation of the common law inherent power of courts of record. Langdon v. Wayne Circuit Judges, 76 Mich. 358. The Recorder's Court of the city of Detroit was re-established by Act No. 326, Local Acts 1883 (3 Comp. Laws 1951, Sec. 14633 et seq.). It has original and exclusive jurisdiction over certain criminal offenses committed within the corporate limits of the city, and supplants the circuit court of the county in that respect and territory. To exercise such jurisdiction, it was given the general powers of the circuit court. This included the jurisdiction in contempt pos-[fol. 44] sessed by the circuit court, inherent as well as statutory. Nichols v. Judge of Superior Court of Grand Rapids, 130 Mich. 187.

"Defendant, however, contends that the judicature act, being subsequent to the recorder's court act, impliedly repeals the general grant of powers in the latter as far as it applies to contempt. His position is untenable on several counts. Repeals by implication are not favored. 'Only when two acts are so incompatible that both cannot stand does the latter repeal the former'. Highland Park v. McAlpine, 117 Mich. 666. There is no such incompatibility between the acts under consideration. The recorder's court act was intermediate the original and present contempt statutes. As the latter was merely a re-enactment of the former, the recorder's court act maintains its position of qualifying the latter as it did the former. 36 Cyc. p. 1084. The judicature act was a revision of the practice. Where there is an express repealing clause in a revision, only enumerated acts are repealed unless other legislative intent clearly appears. 36 Cyc. pp. 1081, 1082. The judicature act attempted no wholesale repeal or abrogation by general language, but carefully and specifically set up the particular statutes repealed [fol. 45] by it. Neither the recorder's court act nor any part of it is listed in the repealing clause of the judicature act. The power of the recorder's court to punish for contempt in the exercise of its criminal jurisdiction is as necessary as that of the circuit court. The indices are that the legislature intended to leave that power intact. The court had jurisdiction."

The foregoing quotations of law clearly demonstrate that the powers given by statute to the Recorder's Court by a two-thirds vote of each house elect, cannot be withdrawn from the Recorder's Court except by a like two-thirds vote of all elect. In addition, those who argue that Sec. 28.944 M. S. A. does rescind previous necessary and essential powers of the Recorder's Court, must rely upon repeal by implication only to support their argument. On the basis of both phases of this argument, the original contempt powers of the court have been left in their previous condition unrestricted and unrescinded by the provisions of Section 28.944 M. S. A.

Even if Sects. 28.944 and .945 Are Valid and Binding on the Recorder's Court, They Do Not Apply to This Contempt

Section 5 of the Grand Jury Act, being Sec. 28.945, provides that "any witness neglecting or refusing to appear in response to such summons or to answer any questions [fol. 46] which such judge may require as material to such inquiry, shall be deemed guilty of contempt, * * *" The particular contempt with which the respondent in this matter is charged is not a refusal to answer questions but falsification of testimony in the presence of the court. This court through its inherent powers can punish such contempt. The language of the Section can have no application to the type of contempt involved in this proceeding.

Conclusion

Because the Recorder's Court has all the powers of a constitutional court to punish for contempt, and because the Recorder's Court possessed those powers when the Grand Juror was appointed, and because the Grand Juror acts in a judicial capacity and in this contempt hearing herein did sit and act as in a judicial capacity, and because the Recorder's Court created by a two-thirds vote of each house of the legislature has been given powers inherent in constitutional courts, which powers have never in any manner been impaired, the holding of this court is that it has power to punish Lee Roy Murchison for giving false testimony before the Grand Jury. In addition to the foregoing facts, it is held that the portions of Sec. 28.944 M. S. A. which purport to deprive the court of power to try certain contempts are void, because they constitute an undue inter- [fol. 47] ference on the part of the legislature with the inherent power of constitutional courts to punish for contempt, which constitutional power is possessed by the Recorder's Court in like manner as constitutional circuit courts.

It is therefore held that this court has full power to cite, try and punish Lee Roy Murchison for contempt of court in giving false testimony before the Grand Juror.

John P. O'Hara, Judge of the Recorder's Court.

[fol. 48] IN THE SUPREME COURT OF MICHIGAN

[Title omitted]

JUDGE'S CERTIFICATE

I, John P. O'Hara, Judge of the Recorder's Court for the City of Detroit, do hereby certify that the foregoing statement of proceedings and facts involved in the foregoing cause was duly settled by me in accordance with the rules and practice prescribed by the court rules for application for leave to appeal to the Supreme Court, and that it fairly presents the questions for review; that in view of a proposed motion to treat the concise statement together with the appended exhibits as a record on appeal in event the appeal is allowed, matters not ordinarily included in a concise statement have been made part of the application for leave to appeal. That exhibits E, F, and G, transcripts of testimony, because of their bulk, are not bound together with the application documents but will be filed separately.

Dated this 4th day of June, 1954.

John P. O'Hara, Judge of the Recorder's Court for the City of Detroit.

[fol. 49] IN THE SUPREME COURT OF MICHIGAN

[Title omitted]

OBJECTIONS OF PETITIONER TO THE PROPOSED CONCISE STATEMENT OF FACTS AND PROCEEDINGS—Received June 14, 1954

Now comes the above named petitioner and objects to the proposed concise statement of facts and proceedings submitted by the Prosecuting Attorney for Wayne County, Michigan, and shows as follows:

(1) That petitioner believes that the statement proposed by him is complete and adequate for the purposes for which same was required, and that the proposed statement of the Prosecutor contains statements unnecessary to the present proceedings, and particularly by including exhibits therein

mentioned as exhibits B, C, E, F, and G, and makes the record herein unnecessarily long and complex.

(2) That the proposed statement submitted by the Prosecutor contains unnecessary references to the evidence adduced at the hearing, none of which is material to the questions presently involved which are solely questions of law and appear in the face of the proceedings herein. That such questions are substantially similar to those raised by petitioner in his application to the Supreme Court for a [fol. 50] Writ of Prohibition, which Writ was denied without prejudice.

—— ——, Petitioner.

Loomis, Jones & Colden and George Stone, of Counsel, Attorneys for Petitioner, by —— ——, George Stone, Attorney.

[fols. 51-52] Exhibit E to Concise Statement of Facts and Proceedings

State of Michigan, in the Recorder's Court for the City of Detroit

No. 79821

In Re: Contempt Proceedings Against Lee Roy Murchison

Transcript of Proceedings

Proceedings had and testimony taken in the above-entitled matter before the Honorable John P. O'Hara, Judge of the Recorder's Court, at Detroit, Michigan, on Monday, May 10, 1954.

Appearances

Joseph G. Rashid, Assistant Prosecuting Attorney, and Samuel J. Torina, Assistant Prosecuting Attorney, appearing as attorneys on behalf of the People.

James Jackson, Sr., Appearing on behalf of the Respondent.

[fol. 53] About 10:00 o'clock A. M.

The Court: Will you open Court.

(Thereupon Court was opened by the Court Officer, Reiha.)

Mr. Rashid: May I proceed, your Honor?
The Court: Yes.

STATMENT BY THE COURT

For the record, I would like to make a statement.

The matter before the Court now is brought in by an order to show cause to Lee Roy Murchison, why he should not be adjudged guilty of criminal contempt for giving false answers to questions asked of him when he was on the witness stand before the Grand Jury.

The record should show that this hearing is being held in open court and that the front door of the court is open and that the public is entitled to come in and hear the proceedings.

The record should also show that notice of this hearing was given to Lee Roy Murchison on Thursday, May 6, 1954, and at which time I advised Mr. Murchison that, in my opinion, he should get a lawyer to represent him in this [fol. 54] matter.

Mr. Murchison, I understand, is represented by Mr. Jackson.

Mr. Jackson: That is correct.

The Court: Mr. Jackson, wil you enter an appearance on behalf of Mr. Murchison?

Mr. Jackson: Yes.

The Court: So we will have a record of it in the file.

(Brief pause was had.)

Officer Reiha: Mr. Jackson has entered his appearance.

The Court: Mr. James Jackson has now entered an appearance for Lee Roy Murchison.

I should also say that the service of the order to show cause on Thursday last, was made upon Mr. Murchinson personally in my presence.

Mr. Jackson, before proceeding further, I would like to ask whether Mr. Murchinson pleads guilty or not guilty to the charge against him?

Mr. Jackson: If it please the Court, at this time, the defendant, the respondent here, requests a continuance of this matter, for the reason that he was served with a copy of this order to show cause on Thursday, the 6th day of [fol. 55] this month; that day is the—today is the 10th of this month, that there is involved questions of law which, I believe, to be very important in this matter. I refer specifically to the right of your Honor to hear and determine this matter.

Sunday intervened. I have not had sufficient opportunity to prepare myself on this question of law.

I am, therefore, asking the Court for a continuance in this matter, and as persuasive authority that a continuance should be granted, I wish to cite to the Court the case of In Re Dingley.

The Court: What is that citation?

Mr. Jackson: 182 Mich., commencing at page 44.

In this case an order to show cause dated February 9, 1944, returnable on the 16th of February, and request made for a continuance, continuance refused, Supreme Court had this to say:

(Reading.)

> "While we think Mr. Dingley should be punished, if he cannot purge himself of contempt by showing the truth of the publication, much as we dislike to interfere with an order of a court in proceedings of this [fol. 56] nature,"——

and these are contempt proceedings.

(Reading.)

> "We cannot approve of the haste which characterized this proceedings. One of the earliest maxims with which the student of law becomes familiar is that every alleged offender is entitled to his day in court before he is condemned."

And they continue to quote Ferry vs. Whell Company, 71 Vermont, 457. And they continue:

(Reading.)

> "It is a law, it is a rule as old as the law, and nevermore to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all of the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

Now, the fact—and I continue:

[fol. 57] (Reading.)

> "This maxim was not observed, and for that reason the judgment of the Court must be set aside and the proceedings dismissed without prejudice to the right to commence over again."

Now, in this case, he was cited on the 9th of February to appear on the 16th. He appeared and a request was made for a continuance.

The question was put whether or not he was guilty or not, and upon refusal to answer that question, the Court proceeded and determined the issue and sentenced the respondent.

The question was raised whether or not he had sufficient time to prepare himself, because the truth of the facts were at issue, and if he could have established that what he had done was true, and then there would be no contempt.

Outside of the legal question involved, if Murchinson is able to establish that when he testified relative to his activities on the 9th day of March, he was, in fact, telling the truth, then contempt would not lie.

But, outside of that question, we have before us, I submit, a very pertinent legal proposition and as I see it, it is this.

[fol. 58] Can the Legislature abridge the inherent right of a Court of record to proceed in contempt matters in special proceedings authorized under the statute.

I take the affirmative position as to that question, and, your Honor is well aware that to properly present this matter, so that the record will be clear if we are going to the Supreme Court in this matter, that I should be given additional time, I submit to your Honor, to prepare in this matter.

I wish to draw to the Court's attention that excluding the day of service in this matter, four days has elapsed, that Sunday intervened. He is not prepared, and I ask the Court for a continuance.

The Court: Let me ask about this case of In Re Dingley which you cited.

Is that a case of contempt committeed in the presence of the Court?

Mr. Jackson: No, your Honor.

The Court: Well, all right.

Mr. Jackson: No, it is not.

The Court: I thought that is what it was.

Mr. Rashid: Well—excuse me.

The Court: Mr. Rashid?

Mr. Rashid: I was going to say that I don't believe that [fol. 59] the Dingley case is competent authority for a request for continuance at all. No question of the time service in the hearing of the case whatsoever. It was a question of whether or not a particular judge should hear the contempt proceedings. No question as to whether or not he was entitled to a continuance.

The Court: Well, I think we can terminate the discussion of this matter in this way:

I realize, Mr. Jackson, that there may be legal questions here that should require more time and study on your part, as far as the facts are concerned, these facts all arose in the presence and in the view of the Court, and under such circumstances, I believe you will find the decisions have repeatedly held for a contempt of that kind, the witness may be summarily summoned in response to a charge of contempt, and he may be summarily punished.

What I will do, however, is this. We shall take the testimony, then I will give you an opportunity to search the

books and look into the law and withhold my decision on the matter a reasonabe period of *teim*. I don't know what that would be, but we can discuss that later. But, as far as the facts are concerned, we are ready this morning to proceed, and I know of no reason why we should not proceed, since all of these matters occurred directly in view of this Court [fol. 60] in this court room.

So for that reason, I think you ought to state whether your client wishes to plead guilty or not guilty, as to the facts.

Mr. Jackson: If it please the Court, before we reach that point, may I make this observation. I am not giving to devious planning and schemings and in the trial of lawsuits, I believe that it is an issue of, if there is an issue, let's state it, have it determined and settled.

I beleive that this cou-t does not have the right to proceed in this matter. When I say "this court", I mean your Honor does not have the right to proceed in this matter because of a prohibition in the statute.

Now, the question in my mind is this: That if the statute is unconstitutional, that portion of it which has to do with proceedings of this nature, I would like to seek, before the Supreme Court, and I will do it today or tomorrow, if I may be given the opportunity, a prohibition against proceeding, and if I do that, this question will be quickly and definitely decided. We will save time because in all probability this isn't the only time that this question is going to arise in these proceedings. We will save time and energy and confusion; if the testimony is taken in this matter, will I be in position to seek a writ of prohibition? [fol. 61] I submit that I will not.

A day or two will not make so much difference and all of the questions, the meat of it will be raised because the constitutionality of the provisions of the statute relative to the Grand Jury proceeding in this matter will be determined. And the atmosphere will be cleared, and we can proceed in this matter.

The Court: Mr. Jackson, personally I am happy that you represent a defendant here this morning because I think you will take this question to the Supreme Court and I think you will ably represent your position to the Supreme Court.

However, I do not believe that the Supreme Court can

get the true picture of this situation unless we have some facts before the court. I believe that if a writ of prohibition is what you seek, that without some facts upon which to base your petition, the Supreme Court would be at a loss to understand what we are doing, and for that reason, I am going to proceed to have the testimony taken. Then, if you wish to ask for a writ of prohibition, you will have an opportunity to present what is on the record.

I appreciate that there is a legal question involved here, and before this order to show cause was issued, Mr. Rashid [fol. 62] and Mr. Torina and myself spent many hours going into the law to see whether or not the prohibition set up in the statute against the Grand Jury hearing contempt proceedings was a valid one.

It is a serious question and it is one that should be decided by the Supreme Court.

Ordinarily, I would not, myself, take the burden of passing upon a question of this kind. Ordinarily, it is better practice, I believe, to let the Supreme Court in the first instance pass on it, but this question is so important to the conduct of this Grand Jury or any other Grand Jury under this Act, that it should be decided.

I believe that if a Grand Juror cannot hear and punish for contempts committed in his presence, that the One Man Grand Jury Act, so-called, is so emasculated as to be practically useless.

Now, for that reason, I think the question should be decided. And for that reason, with all apologies to the Supreme Court, I am going to pass upon the matter, pass upon the question in this matter.

However, I think that your rights will be protected because I am going to give you time to look into the law and argue the law and present it, and I think that if you ask for a writ of prohibition or whatever other writ you may [fol. 63] have in mind at the time, that the rights of your client will be full- protected and then this question can be placed fully and fairly and squarely before the Supreme Court and it will be easier for the Supreme Court to reach a decision.

Now, I have heard your statement about your position.

Mr. Jackson: May I make this observation.

The Court: (Continuing) You have heard mine, all right.

I think we ought to proceed.

Mr. Jackson: We are—if we are presented with a copy of the order of this Court desingating your Honor to act in these proceedings, a copy of the order to show cause upon which it is indicated that such order will be heard before your Honor, coupled with the provisions of the statute, then, what more would we need to fairly and squarely put this in the lap of the Supreme Court?

The Court: No, it does not present it fairly because a strict reading of the law itself says nothing whatsoever about a contempt for false testimony.

So there are two angles to it. I am telling you that, Mr. Jackson, because when you look into the law, I hope you will look into this phase of it, and if you can give an answer [fol. 64] to that, too, so that that side of it will be presented, there are two angles to it.

Mr. Jackson: I realize that, your Honor.

The Court: So, let us proceed with the testimony and then after we have done that, I will see that the rights of your client are fully protected so that you will have time to present your arguments on the law.

Mr. Jackson: May I then, may the record show that having appeared for the respondent, I object to your Honor as a judge of the Recorder's Court, acting in these special proceedings to hear and determine the question of the contempt of Lee Roy Murchison before these proceedings.

I make that objection because of the provisions of the statute regulating procedure and hearings of this nature.

Having made this objection, I now offer a plea. I take it that I have made these objections and your Honor has overruled?

The Court: That is right.

Mr. Jackson: And the record will so show?

The Court: That is right, Mr. Jackson.

Plea of Not Guilty and Withdrawal Thereof

Mr. Jackson: Now, I offer a plea of not guilty in behalf of Mr. Murchison and ask the Court if at some later time we will not be furnished with the following documents.

[fol. 65] One, a copy of the petition which instituted this so-called one man Grand Jury proceedings.

Two, a copy of the order of this Court desi*ng*ating your Honor as the judge to hear these proceedings.

And, three, a copy of the order to show cause in this matter whereon it will be indicated that these proceedings were to be heard by your Honor.

The Court: Yes, I thi*h*k we can go a little further, Mr. Jackson, to expedite taking the matter to the Supreme Court and I think we can probably mimeograph those and give you enough extra copies so that we can help you make up your record.

Mr. Jackson: Thank you very much, your Honor. Will your Honor pardon me just a second.

(Brief pause.)

Mr. Jackson: Now, if it please the Court, will your Honor permit me to withdraw that plea, the plea of not guilty that I have entered in behalf of Mr. Murchison, and make the statement on the record that he is here, in answer to the order to show cause, and object to any and all proceedings here.

The Court: Yes, Mr. Jackson, you will be permitted to withdraw the plea of not guilty and your objection will be [fol. 66] noted upon the record. But, then, on behalf of your client, I am going to enter a plea of not guilty for him and we will proceed with the testimony.

Mr. Jackson: Very well, your Honor.

Mr. Rashid: Your Honor, I would like to state for the record that pursuant to the order, pursuant to your Honor's order prior to the proceeding of this matter, the court room doors were all opened, and that present in the court room now are members of the press and various members of the bar, together with other spectators.

Just for the purpose of the record.

The Court: Yes.

Mr. Rashid: Now, Inspector Heath, please take the stand.

[fol. 67] Fred Heath, was thereupon called as a witness on behalf of the People, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rashid:

Q. Your name, witness?
A. Fred Heath.
Q. Your occupation?
A. Police officer.
Q. Your status?
A. I am an inspector in charge of the Liquor License Bureau, currently assigned to the Grand Jury.
Q. Prior to your assignment to the Grand Jury, were you assigned to make certain observations of 945 St. Josaphats Street in the City of Detroit?
A. I was.
Q. When did you start making observations of doing and activities at that address?
A. March 1st, 1954.
Q. And were you in company with Lieutenant Claude Ingersoll?
A. I was.
Q. Now, on the 9th day of March, were you making ob-
[fol. 68] servations at that address?
A. I was.
Q. On that day did you observe one Lee Roy Murchison?
A. I did.
Q. What time and where?
A. Shortly after 8:40 A. M., 945 St. Josaphats Court in the City of Detroit.
Q. What did you see him, Lee Roy Murchison, do?
A. Lieutenant Ingersoll and I were assigned at two posts, watching 945 St. Josaphats. Shortly after 8:40 A. M. I joined Lieutenant Ingersoll at his observation point. And I saw Patrolman——

Mr. Jackson (Interposing): Pardon me. May I just ask what time it was that he joined him?
Mr. Rashid: Yes.

By Mr. Rashid, continuing:

Q. What time did you say you joined him?

A. Shortly after 8:40 A. M., I saw Lee Roy Murchison who was standing on the front porch leave the front porch of 945 St. Josaphats, walk between the houses, on the east side of 945 St. Josaphats and walk to the rear door of 945 St. Josaphats where he pushed the rear door buzzer and failed to gain admittance. Patrolman Murchison then walked back between the houses to the street where he [fol. 69] walked west on St. Josaphats Court towards Hastings out of sight.

Q. Now, do you see Patrolman Lee Roy Muchison in court?

A. I do.

Q. Will you point him out?

A. The man sitting directly behind his counsel, Mr. Jackson (indicating).

Mr. Rashid: Let the record show the witness indicated the respondent, Patrolman Lee Roy Murchison.

By Mr. Rashid, continuing:

Q. Now, how long have you known Patrolman Murchison?

A. I would say in excess of five years in all.

Q. In excess of five years?

A. Yes.

Q. Was he at one time assigned to the same bureau you were assigned at?

A. Yes, we both were assigned to the vice bureau.

Q. Was your identification of him at that time based upon your personal knowledge of Lee Roy Murchison or through the photographs or other physical bases of identification?

A. My personal knowledge of the man, knowing him.

Q. Now, while you were there, Inspector, Lieutenant Ingersoll was taking pictures, was he?

A. He was.

Q. You were present when Lieutenant Ingersoll was tak- [fol. 70] ing pictures of this Lee Roy Murchison?

A. Yes, I recall Lieutenant Ingersoll taking pictures of Lee Roy Murchison while on the porch of 945 St. Josaphats.

Q. Do you know what precinct Patrolman Lee Roy Murchison is presently assigned to?

A. Yes, I do.

Q. What precinct?

A. Number 9.

Mr. Rashid: Mark this, please.

(Thereupon People's Exhibit No. 1 was marked by the reporter.)

By Mr. Rashid, continuing:

Q. Now, while you were making observations, Inspector, of the area and of the buildings there, did you come into the physical presence, did you come to know the physical structural make-up of the building?

A. Yes, I did.

Q. Now, I am going to show you Exhibit 1, and ask you whether or not that photograph is identical with the physical surroundings and the structures that you were observing at 945 St. Josaphats?

A. It is.

Q. It is. What portion of 945 St. Josaphats is that a view of?

A. This is a picture taken in front porch of 945 St. Josaphats Court.

[fol. 71] Q. Do you recognize the subject in that photograph?

A. Yes, I do.

Q. Who?

A. Patrolman Lee Murchison.

Q. Same Patrolman Murchison who you identify here in the court?

Mr. Jackson: I object to it.

A. It is.

Mr. Jackson: If the Court please, and ask it be stricken.

The Court: For what reason?

Mr. Jackson: All testimony relative to the photograph.

The Court: What is that?

Mr. Jackson: All testimony relative to the photograph. It hasn't been introduced and hasn't been marked as an exhibit.

Mr. Raschild: Oh, yes.

Mr. Jackson: But it hasn't been introduced into evidence and heaven knows whether this testimony, they may never introduce it in evidence.

The Court: Well, I will rule that unless the photograph is properly identified, it will be stricken from the evidence.

Mr. Jackson: Very well, your Honor.

[fol. 72] The Court: That is, it will be at the conclusion of this hearing.

Mr. Rashid: Any questions from this witness Mr. Jackson?

Mr. Jackson: Yes.

Cross-examination.

By Mr. Jackson:

Q. Now, Inspector Heath, I believe you have testified that since the first day of March of this year, you were engaged in this investigation, is that correct?

A. That is true.

Q. And on the 9th of March, you saw Lee Roy Murchison at the St. Josaphats address?

A. That is true.

Q. In the manner that you have testified here?

A. That is true.

Q. When was the arrest made on the St. Josaphats address, in this cause?

A. The raid that resulted from the investigation made?

Q. Yes.

A. March 15, 1954.

[fol. 73] Q. Lee Roy Murchison was not a stranger to you, was he?

A. He was not.

Q. At the moment you saw him you recognized him?

A. That is true.

Q. On the night of the raid—strike that.

Did you submit a list of persons whom you saw enter the St. Josaphats address or attempt to enter the St. Josephats address before these officers, to any of your superior officers?

A. Yes.

Q. What is the—was the name of Lee Roy Murchison on that list?

A. It was.

Q. When did you submit that list?

A. As the investigation progressed.

Q. To the best of your knowledge, will you give me the date that you submitted such a list containing the name of Lee Roy Murchison?

A. It would be after March 9th, possibly the 10th, maybe the 11th.

Q. Then, between the 9th day of March and the 15th day of March, you were certain that it was between those dates that you submitted the name of Lee Roy Murchison, is that right?

A. That is true.

[fol. 74] Q. Would you say that this name had been submitted on the 14th—the 15th day of March?

A. To my superiors?

Q. Yes.

A. Yes.

Q. Now, were you present on the night of the 15th or the morning of the 16th, of March, when several police officers were called to police headquarters in regards to this St. Josaphats address?

A. Yes, at the close of the investigation that followed, yes.

Q. Was Lee Roy Murchison among those officers who were called to police headquarters, so far as you know?

A. I did not see him there.

Q. Do you know now whether or not he was ever called to police headquarters in regards to the investigation on St. Josaphats?

A. I don't believe he was. Now, I don't—do not know for sure.

Q. Yet you saw him there on the 9th and reported it to your superiors before the 15th that he was there?

A. Yes.

Q. That you knew him?

A. Yes.

Q. That he was policeman?

A. That is true. That he was what?

[fol. 75] Q. He was a policeman?

A. Yes.

Q. You knew him as a policeman?

A. Yes.

Q. Now, you say that it was about between 8:40 and, we will say, 8:50 that you saw, in the morning, that you saw Murchison on that porch?

A. I would say that it would be a minute or two after 8:40 A. M.

Q. And how did he arrive—strike that.

When you first saw him, was he on the porch?

A. Yes.

Q. Did you see him arrive at that address?

A. I did not.

Q. Any other officers so far as you know was there at that time, did they see him arrive?

A. Yes, I believe they did.

Q. Who?

A. Lieutenant Claude Ingersoll.

Q. You were taking pictures, moving pictures, of the persons who came to that address, weren't you?

A. Some of the people that came to that address.

Q. Well, on the morning of the 9th, at about 8:40, you or some other officer in your presence, were taking movies of that address, weren't they?

[fol. 76] A. Yes.

Q. Did this picture, which has been marked as Exhibit 1, and which you have examined, the only picture that you have purporting to be a photograph of Murchison and the St. Josaphats address on the morning of March 9?

A. That picture, Mr. Jackson, was developed from a sixteen millimeter motion picture.

Mr. Jackson: I didn't ask you that, Inspector. Will you read the question back.

(Thereupon the last question referred to was read by the reporter.)

A. I would say no, Mr. Jackson, but I would like to qualify my answer.

By Mr. Jackson, continuing:

Q. Very well, sir. I am interested in your qualifications, Inspector.

The Court: Go ahead with your qualification.

A. That happened to be, that picture happened to be developed from a roll of sixteen millimeter motion picture film. Now, on that film, there will be several other exposures of Patrolman Murchison.

By Mr. Jackson, continuing:

Q. And they all relate to March 9?

A. They do.

Q. You would have, then, among the pictures, photographs showing Murchison on the porch, wouldn't you?

[fol. 77] A. That is right.

Q. Photographs showing Murchison coming down off the porch, wouldn't you?

A. I believe they do show him leaving the porch.

Q. Photographs showing Murchison going to the rear?

A. I do not.

Q. Photographs showing him coming from the rear?

A. I do not.

Q. When you say you "do not", you mean you haven't got pictures?

A. I haven't got pictures of him coming from the rear entrance.

Q. Have you any pictures showing him going on the porch?

A. I really don't recall, Mr. Jackson, just how soon that Lieutenant Ingersoll started photographing him.

Q. You arrived at about 8:40 or shortly thereafter on the morning of the 9th, didn't you?

A. That is true.

Q. Was Lieutenant Ingersoll already there when you arrived?

A. He was.

Q. Now, on what side of St. Josaphats is this address?

The Court: Before you answer that, I think we better agree upon the name of this street. I think St. Josaphats

would be a little shocked at some of the ways it has been pronounced. It is St. Josaphats.

Mr. Jackson: St. Josaphats.

[fol. 78] The Court: Yes.

Mr. Jackson: St. Josaphats.

By Mr. Jackson, continuing:

Q. Well, you get the idea, don't you?

A. Yes, Mr. Jackson, the house is located on the north side of the street, facing south.

Q. And where were you when you say you saw Lee Roy Murchison on that porch?

A. Immediately next door to the east from 945 St. Josaphats Court.

Q. How far away from the porch would you say you saw Lee Roy Murchison?

A. About eight feet.

Q. Was this picture taken from approximately eight feet away from the person who was on the porch at that time?

A. Yes.

Q. Can you tell us how Murchison was dressed that morning?

A. (No response.)

Q. The person whom you say was Murchison?

A. Yes, I can.

Q. Can you tell us that from certain notes that you have, don't you?

A. That is true.

Q. May I see these notes. By the way, you have been [fol. 79] using those notes to refresh your recollection during all your testimony, haven't you?

A. Yes, I have.

Q. May I see them.

Mr. Rashid: Now, just a moment.

If the Court please, we have no objection to counsel examining those portions of those notes that relate to the respondent, Lee Roy Murchison.

Mr. Jackson: Well, do you separate them. I am not interested in anything else.

Mr. Rashid: All right.

The Court: Well, just fold the paper so that only the references to Murchison will be in view.

By Mr. Jackson, continuing:

Q. Those are not your notes, are they?

A. Yes.

Q. All right. You have told us that you never saw Lee Roy—first time you saw Lee Roy Murchison he was on the porch, didn't you?

A. That is true.

Q. Just a minute ago?

A. Yes, sir.

Q. And those notes recite that you saw him walking up to that address known, and on that porch, don't you?

[fol. 80] A. If you will take particular notice to these notes——

Q. (Interposing:) I read them. Don't ask me to do anything. I am asking you whether or not these notes show that.

A. Yes, but I would like to state that these notes are both my notes and Lieutenant Ingersoll's notes.

Q. What portions—all right, then—what portions,—strike that.

You mean to say that you and Lieutenant Ingersoll got together and exchanged information and those notes are the result of the combined information or knowledge that you and Lieutenant Ingersoll had, is that what you want to tell us?

A. The notes clearly indicate, Mr. Jackson, just when I joined Lieutenant Ingersoll on these observations.

Q. I am not interested in what those notes clearly indicate. I asked you a question. And the question is this: Those notes that you hold in your hand, are they the result of a conference between you and Lieutenant Ingersoll and contain facts which you, yourself, have no personal knowledge of?

A. I did not testify to anything on the paper that I don't, that I didn't see.

Q. I didn't ask you that. I asked you,—repeat that question, will you, please?

[fol. 81] (Thereupon the last question was read by the reporter.)

A. We did not exchange information.

By Mr. Jackson, continuing:

Q. I didn't ask you that. That question can be answered yes or no.

Is it or is it not the result of the combined information which you and Lieutenant Ingersoll had?

A. They are the combined information.

Q. So they are not yours, are they?

A. Yes.

Q. You made them?

A. Yes.

Q. All right. I am going to read them into the record.

(Reading.)

"Detroit Police Department.

"Vice Bureau, March 9, 1954, Tuesday.

"To Senior Inspector Paul Slack?

"Subject: Report on activities observed at 945 St. Jos,——"

What is that?

The Court: Josaphats.

Mr. Jackson: Josaphats.

The Court: You remember St. Joseph and it comes easy.

[fol. 82] By Mr. Jackson, continuing to read:

"945 St. Josaphats, this date, by Inspector Fred Heath and Lieutenant Claude Ingersoll.

"7:30 A. M. Inspector Fred Heath and Lieutenant Claude Ingersoll on duty.

"Lieutenant Ingersoll, 8:40 A. M., saw Patrolman Lee Murchison, badge 715, who was wearing a green plaid shirt, light grey suit, light brown overcoat, not buttoned, in parenthesis, bareheaded, who was walking east on St. Josaphats Court, from Hastings, walked to front entrance of 945 St. Josaphats Court where he failed to gain admittance. Inspector Heath joined Lieutenant Ingersoll at this time. Patrolman Murchi-

son, after failing to gain admittance, walked between the houses to rear door where he pushed the buzzer and again failed to gain admittance. Patrolman Murchison then walked between the houses to the street where he went west on St. Josaphats Court towards Hastings Street out of sight."

Now, these notes purport to be the notes of Lieutenant Ingersoll, don't they?

[fol. 83] A. They are the notes of both Lieatenant Ingersoll and of myself.

Q. All right. Let me ask you this. They are dated March 9, is that right?

A. That is right.

Q. Were they typed March 9?

A. Yes, they were.

Q. What time, if you can remember?

A. Somewhere between 9:00 P. M. and 3:00 A. M. the next morning.

Q. During the interim between 8:40 or thereabouts in the morning, and the time those notes were typed, as you say, certain information was secured from other sources than your observations at that time, wasn't it?

A. No, that is not true.

Q. And was not some added on those notes?

A. That is not true.

Q. Oh, but you looked up Murchison's badge number, didn't you?

A. Yes.

Q. Yes, sure. And you found out what precinct he worked at, too, didn't you?

A. I knew what precinct he worked at.

Q. You knew what precinct. Now, those notes have been dated March 9, and having been typed sometime between 9:00 o'clock in the evening, March 9, and 3:00 o'clock in the morning of March 10, I believe that is a correct statement [fol. 84] of what you have said, isn't that true?

A. I would say yes, that is when they were typed.

Q. Now, can you tell us when those notes were turned over to Inspector Slack?

A. Sometime that following day or it might have went two days before he received them.

Q. That is, they might have been turned over to him on the 10th or the 11th?

A. Or the 11th.

Mr. Jackson: Pardon me just a second.

By Mr. Jackson, continuing:

Q. I am interested very much in this picture. I believe this picture indicates that it was taken from behind venetian blinds, is that correct?

A. That is true.

Q. That the camera was behind the venetian blinds?

A. That is true.

Q. And the venetian blinds were between you and the subject of this photograph?

A. That is true.

Mr. Jackson: I believe that is all from this witness.

Pardon me, just a minute. If it please the Court, now, during the cross examination of the witnesses, the first witness, and all other witnesses, that are here, I believe is in [fol. 85] accordance with the Court's statement that the record will contain the facts which would in the Court's opinion be necessary to aid the Supreme Court in arriving at a decision in this matter.

The Court: That is right.

Mr. Jackson: And I do not wish to appear, over the objection that I have already made, to waive the question of the right of the Court to hear and determine this matter, and I wish the record to be protected on the record in that record.

The Court: Well, your objection is on the record all the way through the proceedings, it isn't necessary to mention it at any other time.

Mr. Jackson: Very well.

The Court: It is understood that all the testimony being taken is subject to your objection.

Mr. Jackson: Very well, your Honor.

(Witness excused.)

[fol. 86] CLAUDE INGERSOLL, was thereupon called as a witness on behalf of the People, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rashid:

Q. Your name, Lieutenant?
A. Claude Ingersoll.
Q. You are a member of the Detroit Police Department?
A. I am.
Q. How long have you been a member of the Police Department?
A. Seventeen years.
Q. Now, you were assigned to make observations at 945 St. Josaphats Court in the City of Detroit?
A. I was.
Q. Now, you were assigned to this address, 945 St. Josaphats Court, on the 9th day of March, 1954; is that not true?
A. I was.
Q. At that time what bureau or division were you assigned to, Lieutenant?
A. I was assigned to the Vice Bureau.
Q. Do you know Lee Roy Murchison?
A. I do.
[fol. 87] Q. Do you see him in court?
A. I do.
Q. Will you point him out?
A. Seated across the table, immediately in back of Mr. Jackson.

Mr. Rashid: Let the record show the witness indicates Lee Roy Murchison.

By Mr. Rashid, continuing:

Q. How long have you known him?
A. I first met Patrolman Murchison, I believe, back in about 1944, '45, somewhere in there. It is at least ten years or longer.
Q. Ten years or longer?
A. Yes.

Q. Where were you assigned at that time?

A. I was assigned to the 13th Precinct.

Q. Where was he assigned at that time?

A. He was working at the 13th Precinct on clean-up at that time.

Q. Did he ever work with you on clean-up?

A. I believe on one or two occasions. I am not definite on that.

Q. Now, did you see him on March 9, 1954, at 945 St. Josaphats?

A. I did.

Q. At what time?

A. About 8:40 A.M.

Q. And what was he doing when you saw him?

[fol. 88] A. When I first saw him, he was walking east on St. Josaphats. He came to the gate, to the entrance of 945 St. Josaphats, walked up on the front porch and rang the doorbell of 945 St. Josaphats.

Q. That's the front doorbell?

A. That's the front doorbell.

Q. All right. And then what happened?

A. He remained on the front porch for possibly two minutes, and then turned and went down off the porch, walked between the houses to the rear entrance of 945 St. Josaphats, where he again pushed the buzzer. He remained there for probably about a minute and a half or two minutes, and turned around and walked between the houses again, to the street, where he walked west on St. Josaphats towards Hastings Street out of sight.

Q. All right. Now, you and Inspector Heath were at two different locations, were you not?

A. We were.

Mr. Jackson: I am going to object to the form of that question, if it please the Court.

Mr. Rashid: All right. I think it is leading.

The Court: The question is slightly leading, but Mr. Rashid will try to avoid leading the witness.

By Mr. Rashid, continuing:

[fol. 89] Q. What other officers were making observations with you at that time?

A. Inspector Heath.

Q. At what point, if at all, did Inspector Heath join you in making observations of Patrolman Murchison?

A. Well, Patrolman Murchison was standing on the front porch of 945 St. Josaphats. Inspector Heath joined me at the same point of view.

Q. Prior to that point, were you and he making observations from different points?

A. Yes.

Q. All right. Now, Lieutenant, were you taking pictures there?

A. I took some pictures as Patrolman Murchison stood on the front porch of 945 St. Josaphats, and then after he had come from the rear of the house and started to walk west on St. Josaphats, I took some more pictures.

Q. All right. Now, moving pictures?

A. They are moving pictures, yes, sir.

Q. What kind of a camera?

A. Sixteen millimeter.

Q. Do you know whether or not they were developed?

A. I turned them over to Inspector Nowlin to have them developed, yes.

Q. You turned them over to Inspector Nowlin to have them developed?

[fol. 90] A. Yes.

Q. All right. Now, from your observations there, do you have a distinct recollection now of the physical structure and the make-up of the buildings that you were observing.

A. Yes.

Q. Were you taking pictures through a venetian blind?

A. Yes.

(Whereupon Exhibit 1-A, consisting of eleven photographs, was marked for identification by the reporter.)

Mr. Jackson: 1-A will consist of eleven photographs, is that right?

Mr. Rashid: Yes.

By Mr. Rashid, continuing:

Q. I will show you proposed Exhibit 1, witness, and ask you whether or not that is a photograph of the identical

likeness of the identical structure which you observed at that time?

A. Yes, it is.

Q. And is the photograph of the human subject there identical with that of anyone known to you?

A. It is.

Q. And who?

A. Patrolman Lee Roy Murchison.

Q. Now, as you took the movies, Lieutenant, did you take other views of the subject that you were taking pictures [fol. 91] of at that time?

A. Well, he moved and I have a camera on him at the same time, and got various views of him.

Q. All right. Now, I am going to show you proposed Exhibit 1-A, consisting of eleven photographs, and ask you the same questions with respect to them, namely, are they photographs of the physical structure at 945 St. Josaphats where you observed Lee Roy Murchison?

A. They are.

Q. And do you recognize the human being subject in the photograph?

A. I do.

Q. And who is that?

A. Patrolman Lee Roy Murchison.

Q. All right. And was Lee Roy Murchison in that position and at that point as observed in those photographs when you took them of him?

A. He was.

Q. All right. Incidentally, Lieutenant, what were the general lighting conditions when you were taking those photographs?

A. It was quite a bright day. The sun was shining that morning. As I recall it, it was quite bright out.

Q. Now, you made notes of your observations, did you not?

A. I did.

Mr Rashid: All right, you may cross examine, Mr. [fol. 92] Jackson.

Cross-examination.

By Mr. Jackson:

Q. Lieutenant Ingersoll, you saw the person whom you are now testifying to as being Patrolman Lee Roy Murchison walk up to that porch?

A. Yes, sir.

Q. He came from what direction?

A. Well, he walked east on St. Josaphats from the direction of Hastings Street.

Q. Were you east or west—strike that.

Did he have to pass the place where you were to reach Josaphats?

A. No, sir.

Q. After you saw this person, and were convinced in your own mind, as you have testified, that it was Patrolman Lee Roy Murchison, did you make any investigation to determine what hours or shift Patrolman Murchison was working on that day?

A. Yes, I did. I looked at the desk blotter of the 9th Precinct. As I recall it, he was on leave that day.

Q. You did make an investigation to determine it?

A. As I recall it, yes.

[fol. 93] Q. When did you make that investigation?

A. I really can't say, Mr. Jackson, definitely.

Q. You didn't do it the 9th?

A. Pardon?

Q. You didn't do it on the day of the 9th?

A. No, sir.

Q. You did at some later date?

A. Yes, sir.

Q. When you say that the result of your investigation disclosed that he was not working that day, do you mean that he was not working on the day shift or the afternoon shift or the night shift which shift he was working?

A. I really don't know, I really don't recall now what shift he was assigned to, but it is my recollection now—I could be wrong on this—I would have to verify it again, but my recollection is that he was on leave that day.

Now I would have to verify that to be sure, Mr. Jackson.

Q. That is my information also. I think you are right.

I was trying to draw from you whether or not you knew what shift he was working at that time?

A. I did know but I don't recall it this time.

Q. Now, could you see the rear porch of this address at St. Josaphats?

[fol. 94] A. Could I see the rear porch?

Q. Yes.

A. Yes, I saw the porch, the rear porch.

Q. And did you take any pictures of a person whom you identify as Patrolman Murchison, on the rear porch?

A. No, I did not.

Q. All the pictures that were taken and exhibits here were taken by you?

A. Yes.

Q. I believe your testimony is that it was a bright day; is that right?

A. It is my recollection that the sun was shining that day. It was plenty light.

Q. Plenty light?

A. Yes.

Q. Have you had any experience with photography and developing pictures?

A. Slightly, not any great amount.

Q. Can you give us any enlightenment on the difference——

Mr. Jackson (addressing the reporter): Will you make this for identification as Exhibit 1-B?

(Whereupon a photograph was marked Exhibit 1-B for identification by the reporter.)

By Mr. Jackson, continuing:

Q. All of the pictures in Exhibit A, which you have ex-[fol. 95] amined, were taken within a space of how much time, would you say?

A. Oh, they were taken within a space of about two minutes.

Q. About two minutes. And all were taken on March 9th?

A. Yes, sir.

Q. Can you explain the difference between the exposures and the light on Exhibit A and B, Exhibit 1-B?

A. No, I can't explain it whatsoever. It is continuous film, as I recall it.

Q. Continuous film?

A. Yes. I might have hesitated——

Q. (Interposing) Do you have that continuous film?

A. Yes. I wanted to say, Mr. Jackson, when I say continuous film, now I might have hesitated momentarily if he looked directly at the camera. I might have moved out of sight momentarily. When I say continuous, it would be just a brief second or two, or whatever it was, and then I would continue again. There is no pictures intervening between those two pictures.

Q. Did you move your camera during the taking of those pictures in those two minutes you say that elapsed?

A. I can't understand how you mean.

Q. Did you change the position of your camera?

A. Well, I had it in my hand. I very possibly did. It [fol. 96] would be impossible to hold it still, I would say.

Q. You had it in your hand?

A. That is right.

Q. You were moving around with it?

A. Yes.

Q. Did you have it in your hand when you went—strike that. Did you have it in your hand when you say you saw Patrolman Murchison go to the back door?

A. Yes, I did.

Q. Did you take any picture of that?

A. No, I didn't.

Q. Were all these pictures taken from one room?

A. Those, yes, sir.

Q. What room was that?

A. Bedroom.

Q. A room fronting on the street?

A. There is no window on the street. The window is on the side. It is to the front of the house.

Q. The room fronted on the street, didn't it?

A. It was to the front of the house. However, there was no window opening directly on the street. It opens in the side.

Q. Opens to the side?

A. Yes, sir.

Q. How many times did this person whom you say was [fol. 97] Patrolman Murchison go up on the front porch?

A. I missed part of your question.

Q. How many times did this person whom you have identified as Patrolman Murchison go up on the front porch?

A. Just once.

Q. Does this photograph, Exhibit 1-B, purport to be a picture where the subject was coming down off of the porch?

A. No, sir.

Q. Now, those notes that I noticed you referred to once in awhile, they interest me.

Inspector Heath folded a portion so that I couldn't see what was on the bottom, and the purpose of that was so that I wouldn't see anything that referred to possibly some other action or some other person, but those notes start off, that is, the body of it,

"Lieutenant Ingersoll", doesn't it?

A. That is correct.

Q. Now, fold it just as it was folded when I had it. Now, the name "Inspector Heath" shows, and that's all, doesn't it?

A. You mean the top of the fold here, Mr. Jackson?

Q. The last thing you will be able to see when it is folded like that.

A. Yes, it does.

Q. At the time you were making those observations, you [fol. 98] made certain memoranda of what you saw, didn't you?

A. Briefly, yes.

Q. I mean briefly. What did you do with them?

A. After we made the notes, we destroyed them.

Q. You use the term "we", again. Does it mean that those notes are, in part, made from your observations and Inspector Heath's observations? The ones I am referring to that I saw.

A. Yes, there is both observations in here.

Q. Just fold it like it was. I notice that it says "Inspector Heath joined Lieutenant Ingersoll at this time". That means it follows immediately after the statement that he came to the front door where he failed to gain admittance.

Now, does that mean that Inspector Heath came to the

place where you were, or does it mean that he joined you in your observations at that time?

A. It means that he came to the place where I was making my—my point of observation.

Q. Was he already in the building?

A. Yes, sir.

Q. And what time did he go to the building, so far as you know?

A. The same time that I did, about 7:30 A.M. that morning.

Q. I see. Were you in police headquarters on the evening of the 15th, after the raid was made?

[fol. 99] A. Yes, sir.

Q. A number of policemen were called to headquarters for questioning of their activites because of the situation at St. Josaphats, weren't they?

A. Yes, sir.

Q. On the 9th day of March you knew that a person whom you have identified as Murchison had been to that address, didn't you?

A. Yes, sir.

Q. You had so reported that fact to your superior officers, hadn't you?

A. Yes, sir.

Q. Was Murchison among the police officers who were called to police headquarters on the evening of the 15th of March?

A. No, sir.

Q. So far as you know, had he ever been called in for question relative to this situation at St. Josephats?

A. Not to my knowledge.

Q. The persons who were called—strike that.

Of course, you wouldn't control the policies of your department in that regard would you?

A. No, sir.

Mr. Jackson: I believe that is all.

[fol. 100] Redirect examination.

By Mr. Rashid:

Q. Just for the purpose of the record, Lieutenant, the observations you made at that time were made prior to this Grand Jury being called and ordered; is that correct?

A. That is correct.

Q. The pictures which you made, which you took, were likewise taken prior to this Grand Jury being called and ordered; is that correct?

A. That is correct.

Q. All right. And your report was filed and the notes were, which you read from here, or which you used to refresh your recollection here, made prior to the summoning of this Grand Jury.

A. They were.

Mr. Rashid: Anything further, Mr. Jackson?

Mr. Jackson: No.

By Mr. Rashid, continuing:

Q. Witness, would you recall seeing Patrolman Lee Roy Murchison at that address if you didn't have your notes with you this morning?

A. Yes, sir.

Q. You have known him, you said, how many years?

A. Well, it's eight, nine years anyway. I think it is about [fol. 101] '44, '45, somewhere in that neighborhood.

Q. Worked with him in the same precinct?

A. I worked in the same precinct, yes.

Recross-examination.

By Mr. Jackson:

Q. Did you type those notes?

A. No, sir.

Q. Who typed them?

A. Inspector Heath.

Mr. Jackson: I believe that's all.

Mr. Rashid: You may step down.

(Witness excused.)

[fol. 102] Offers in Evidence

Mr. Rashid: If your Honor please, counsel has agreed to stipulate that the photographs being Exhibit 1, Exhibit 1-A, and Exhibit 1-B, and nine other photographs, being part of

Exhibit 1, may be admitted in evidence with a further stipulation on the part of the people that all of these photographs were taken by the same camera; is that correct?

Mr. Jackson: That is correct.

The Court: If I understand the situation, then, proof of the developing of the pictures and printing of them is waived and you offer them in evidence, Mr. Rashid?

Mr. Rashid: Yes, your Honor. And stipulation is also, that they——

The Court: Well, Exhibit 1, 1-A, consisting of nine——

Mr. Rashid: Consisting of nine other photographs.

The Court: Of those, one is Exhibit 1-B, marked so for identification?

Mr. Rashid: Now, that you put it—consisting of ten photographs and of those one is marked 1-B.

The Court: All right. Then, all of those photographs will be admitted in evidence?

Mr. Rashid: Very well, your Honor.

[fol. 103] And the People have stipulated that all of the photographs were taken by one and the same camera.

The Court: Yes.

Mr. Jackson: All right.

The Court: I think you ought to go further and say that they were all taken by Lieutenant Ingersoll?

Mr. Rashid: Yes, he has testified to that, too, your Honor.

Bernice Gough, was thereupon called as a witness on behalf of the People, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rashid:

Q. Witness, your full name?
A. Bernice Gough.
Q. And your occupation?
A. I am a court reporter.
Q. You are a court reporter?
A. Yes, sir.

Q. And you are assigned to the Judge O'Hara Grand Jury?

[fol. 104] A. Yes, sir.

Q. Sitting in this Court?

A. Yes.

Q. And before whom you are now testifying?

A. That is right.

Q. Your duties are briefly what, Miss Gough?

A. To take verbatim notes of testimony and transcribe them.

Q. Now, did you take verbatim notes of the testimony of one Lee Roy Murchison?

A. Yes, I did.

Q. At what date?

A. Wednesday, April 7, 1954.

Q. Wednesday, April 7?

A. Yes, sir.

Q. Do you see the man in court that you took those notes from?

A. Yes, sir.

Q. Will you point to him?

A. Sitting behind Mr. Jackson, counsel, (indicating).

Q. Just point to him, if you will.

A. Yes, right over there (pointing).

The Court: Let the record show the witness indicated Respondent Lee Roy Murchison.

By Mr. Rashid, continuing:

Q. Did you t*h*n transcribe those notes?

[fol. 105] A. Yes, I did.

Q. Did you put them in folio form?

A. Yes.

Q. You made an accurate transcript of those notes you took, being testimony of Lee Roy Murchison, on the date you have testified to?

A. Yes, sir.

Q. And do you have them in your possession now?

A. Yes, I have.

Q. All right. Now, witness, will you refer to page 1359 of the transcript of the testimony of Lee Roy Murchison taken on the 7th day of April, 1954?

A. Yes.

Q. Now, do your records indicate--do your notes indicate whether or not Lee Roy Murchison was sworn?

A. Yes.

Q. And what do your notes indicate on that point?

A. Want me to read it?

Q. Yes.

A. (Reading.)

"Lee Roy Murchison was sworn to tell the truth, the whole truth, and nothing but the truth and to forever keep secret any and all proceedings of any kind and nature con-[fol. 106] nected with this inquiry, except as he may be required to di ulge the same by law; and testified as follows:"

Q. All right. Do your notes disclose an examination of the witness?

A. Yes, they did.

Q. Conducted by whom?

A. By Mr. Rashid.

Q. In the presence of whom?

A. In the presence of Judge O'Hara.

Q. All right. Is there a question put to the witness as follows:

(Reading.)

"Q. What is your full name, witness?
"A. Lee Roy Murchison."

A. Yes.

Q. Was this question put to the witness and did he make this answer:

(Reading.)

"Q. Are you a policeman?
"A. That is correct, sir."

A. Yes, that is right.

Q. All right. Now, will you refer to page 1360 of the transcript?

A. Yes.

Q. Was this question put to the witness and did he make this answer:

[fol. 107] (Reading.)

"Q. You have testified under oath before, haven't you?
"A. That is correct, sir.
"Q. You understand the oath that the Court administered to you a few moments ago, don't you?
"A. That is correct, sir."

A. Yes.

Q. (Reading.)

"Q. And you understand that it is your responsibility as a matter of righteousness and as a matter of law that you were sworn to tell the truth?
"A. That is correct, sir."

A. Yes.
Q. Now, will you refer to page 1362. Were these questions put to Lee Roy Murchison, and did he make these answers:

(Reading.)

"Q. Well, where is 945 St. Josaphats Court? In what precinct?
"A. In 13.
"Q. In 13?
[fol. 108] "A. Yes.
"Q. How many times have you been there?
"A. None as I can ever remember.
"Q. I didn't hear you.
"A. None as I can ever remember."

Does that transcript indicate that those questions were put to the witness and he made those answers?
A. Yes, it does.
Q. Now on the bottom of the same page, 1362:

(Reading.)

"Q. Now, do you know that 945 St. Josaphats Court was under observation for many months by certain members of the police department?
"A. I didn't know, because I am never down that way."

A. Yes.

Q. Were those questions put to the witness and did he make those answers?

A. Yes, that is right.

Q. Now, on page 1363, were these questions put to the witness and did he make these answers:

(Reading.)

"Q. Witness, you know you are under oath?

[fol. 109] "A. That is correct.

"Q. How may times did you go there in January of this year?

"A. None.

"Q. How many times in March?

"A. None.

"Q. Well, witness, you don't want us to believe and you don't want to sit on this witness stand and under oath deny that you were there at any time this year?

"A. I haven't been there."

Were those questions put to the witness and did he make those answers?

A. Yes.

Q. Now, will you refer to page 1364.

(Reading.)

"Q. You haven' been there?

"A. No, sir. To tell you the truth, I wouldn't even know exactly where 945 St. Josaphats would be."

Was that question put the witness and did he make that answer?

A. Yes, it was.

[fol. 110] Q. All right. Now, will you refer to page 1365.

(Reading.)

"Q. All right. Now, you know we have a picture of you there?

"A. Couldn't be me.

"Q. Couldn't be you?

"A. No, sir.

"Q. If you saw the picture, if it was shown to you, and shown what you did, how you went in the house and range the buzzer, would you still deny it?

"A. That is correct, because I haven't been there."

Were those questions put to the witness and did he make those answers?

A. Yes, they were.

Q. Now, referring to page 1366:

(Reading.)

"Q. And if you do see it, ——"

Referring to the picture.

(Reading.)

"—will you be man enough to admit that you were there and why you went there?

"A. I have never been there.

[fol. 111] "Q. Did you get in when you went there in the month of March?

"A. I didn't go there. It must be a mistaken identity."

Does the transcript indicate those questions were put to the witness and that he made those answers?

A. Yes, it does.

Q. All right. Now, referring to page 1367?

(Reading.)

"Q. All right. Now, I guess you probably won't be convinced until you see yourself in the movies?

"A. That is correct, and I still won't be convinced.

"Q. And you still won't be convinced?

"A. That is correct."

Were those questions put to the witness and did he make those answers?

A. That is right.

Q. On page 1368, was this question put to the witness and did he make this answer?

(Reading.)

"Q. And after you see that, will you tell us what you went there for?

[fol. 112] "A. I haven't been there."

Will you refer to page 1369 of the transcript, bottom of the page: Does the transcript indicate these questions were put to the witness and he made these answers:

(Reading.)

"Q. You spent a little time around Steve's house the day you went there?

"A. Me?

"Q. You rang the bell, couldn't get in, walked around the side.

"A. That wasn't me.

"Q. That was the last time you were there?

"A. No, sir, not me."

Were those questions put to the witness and did he make those answers?

A. That is right.

Q. The bottom of page 1370, does the record indicate that the Court put this question to the witness and the witness made this answer:

(Reading.)

"The Court: Do I understand you correctly to say that even though you saw yourself in the moving picture at [fol. 113] Steve's house, you wouldn't admit you were there?

"A. That is right. I would say it must be a mistaken identity, because I haven't been there."

Were those questions put by the Court and did the witness make that answer?

A. Yes.

Q. All right.

Mr. Rashid: I think that just about covers it, if the Court please.

The Court: Could I see that, Mr. Rashid.

(Mr. Rashid thereupon hands the record to the Court.)

Mr. Rashid: You may cross examine.

Cross-examination.

By Mr. Jackson:

Q. Will you please tell me who was present at the time you took the testimony?

A. Who was present?

Q. Yes, please.

A. Well, Mr. Rashid, and Judge O'Hara, and I couldn't [fol. 114] recall who the other officers would be that would be in the room.

Q. Do you distinctly and independently remember taking this testimony?

A. Yes, I do.

Q. Do you remember the person who was on the stand?

A. Yes, I believe I do.

Q. No, I want to be certain about it, because you took a lot of testimony?

A. Yes.

Q. And a lot of different people testified and you concentrated on getting down the spoken words, the words spoken by everybody.

A. Yes.

Q. And oftentimes as soon as you finish with one person, you started on another one?

A. That is right.

Q. And under ordinary circumstances—I want you to search your own memory now, would you have an independent recollection of having taken that testimony and that it was taken from this person, Le Roy Murchison?

A. Yes, sir, I would say.

Q. You would?

A. Yes, sir.

Mr. Jackson: I believe that is all.

[fol. 115] (Witness excused.)

FRED HEATH, was thereupon recalled to the stand as a witness on behalf of the People, and having been previously duly sworn, testified further as follows:

Redirect examination.

By Mr. Rashid:

Q. Now, Inspector, the observations you made of Lee Roy Murchison at 945 St. Josaphats were made prior to the time that this Grand Jury was ordered?

A. That is true.

Q. Were you present at 945 St. Josaphats when that dwelling or building was raided by Detroit police?

A. I was.

Q. What was the date of that raid?

A. March 15, 1944, at approximately 1:00 P. M.

Q. And that likewise was prior to the time that this Grand Jury was called, is that not right?

A. Yes.

Q. '54, you mean, don't you?

[fol. 116] A. '54.

Q. Now, while you were engaging in this raid, was any gambling paraphernalia seized at 945 St. Josaphats Court?

A. There was.

Mr. Jackson: I do object to it. It is irrelevant and immaterial so far as these proceedings are concerned.

The Court: I think it is material, Mr. Jackson, so the question and answer will be permitted to stand.

By Mr. Rashid, continuing:

Q. Do you recall what kind of gambling paraphernalia, Inspector?

A. Mutuels bet slips.

Q. About how many? How much in value?

A. I believe there were in excess——

Mr. Jackson (Interposing): Just a minute, Inspector. I am going to object to it. I don't know. I can understand the purpose of the question but I can't understand how Inspector Heath's testimony can be substantive proof or evidence of what was seized at that house at that time.

The Court: I think as far as he has gone, it is all right. He said that bet slips were seized.

Mr. Jackson: Yes, your Honor.

The Court: I think as far as he has gone, that's all [fol. 117] right.

By Mr. Rashid, continuing:

Q. Did you see the bet slips that were seized there, Inspector?

A. I did.

Q. Do you have any knowledge from your observation and examination of those bet slips how many were there, how much in value?

A. I believe that there was in excess——

Mr. Jackson (Interposing): Just a minute, I am going to object to this, if it please the Court. My objection is based, if this testimony alone is allowed to stand, then there is being substituted evidence of a fact where the best evidence of that fact is in existence, and he is asking the Court to accept his word as to the actual existence of this thing.

The Court: What you really mean, Mr. Jackson, is that this is not the best evidence of whether or not these bet slips amounted to so much money and were seized.

Mr. Jackson: That is correct.

The Court: I suppose what you mean is that the slips themselves are the best evidence.

Mr. Jackson: That is correct, sir.

The Court: I think you are right.

Mr. Rashid: Well, may I drop that just for a moment, then, if the Court please.

[fol. 118] Mr. Jackson: I say this, if it please the Court, if he wants to testify that there were bet slips, things that he knows from his experience as a police officer were found in that place, and let it go at that, I have nothing to say. I don't wish to put anybody to a whole lot of trouble to establish the facts that ultimately will be established, and if he wants to leave it there, all right.

Mr. Rashid: I respectfully——

The Court: I will just indicate what I think about it myself. I think that the record could show that money also was seized there, which I think is correct, and also show that

as a result of that a conspiracy charged to violate the gambling laws in is now pending in this court. I think if those matters were shown, that could properly be admitted.

Mr. Rashid: May I respectfully submit to you Honor that I can't quite agree. This witness was there, and he can testify to what he saw, and that's all he is testifying to. I can qualify this man as an expert, as a matter of fact, in gambling.

That's all I am asking that he testify to, if from his observation and examination of the slips he saw there, could he tell the Court how many there were, or approxi- [fol. 119] mately how many there were, or how much in value.

Now, your best evidence rule has its application in certain places. He isn't testifying to anything that tends to modify a document or anything of that kind. He is saying that here are physical objects which I saw.

The Court: Well, Mr. Rashid, if I understand what you are doing, you want to show the materiality between the denial of the respondent here that he was at 945 St. Josaphats Court and the fact that it was a place that was raided after observations, that bet slips were seized, and that as a result of that, a prosecution for conspiracy to violate the gaming law is now pending in this court.

Mr. Rashid: That is right, and more than that, that certain persons were arrested in that place who came there to engage in gambling.

Mr. Jackson: I am going to object to that. I submit that I don't know what kind of proof he is going to submit to show that people arrested there came to that place for a certain purpose.

The Court: Well, let's see if we can agree upon a couple of things here. Can we agree that as a result of a raid which was made on March 15, 1954, gambling paraphernalia was seized, certain persons were seen there, placed under arrest, and that as a result of that, a complaint [fol. 120] charging conspiracy to violate the gambling laws was filed and warrants were issued in pursuance of that complaint, and at the present time the conspiracy is awaiting trial in this court?

Can we agree on that?

Mr. Jackson: Yes.

The Court: All right.

Mr. Torina: Your Honor, isn't there one further point? And as a result of those raids, wasn't this Grand Jury called? Isn't this Grand Jury —

The Court: Well, I think we can agree that the Grand Jury grew out of that raid, and at the request of the prosecutor, in which the Commissioner of Police joined was a result of the raid that was made upon 945 St. Josaphat Court, the place where, according to the photographs, the respondent here, Lee Roy Murchison, stood upon the porch.

Mr. Jackson: May it please the Court, may I make this observation?

It is my opinion, based upon my experience over a great number of years, that the raid at St. Josaphats in itself and by itself would not have caused this Grand Jury to be called. It is my belief, based upon my experience [fol. 121] over a great number of years, that the reason why this Grand Jury is here is because of the nature of certain persons who were seen frequenting that place, and there is a suspicion, and I believe a well founded suspicion, that there was an agreement between certain police officers and someone who is violating the law to violate the law, and I believe that's the reason why this Grand Jury is empaneled.

The Court: You have amplified the situation a little, Mr. Jackson, and I will agree with you. Let's be plain about it.

The fact that policemen were observed by the two officers who were here, and other officers of the police department, going to the doors, in some cases going inside 945 St. Josaphats Court, gave rise to the belief that the gambling operations conducted there were being conducted unmolested because the police who should have been interfering were being paid not to do so.

Mr. Rashid: That's the exact statement of the situation.

The Court: I think that puts —

Mr. Jackson: (Interposing) That's what it is. There isn't any doubt about it.

The Court: Yes, we might as well be frank about it.

[fol. 122] Mr. Rashid: Just for the record, can I ask the witness one question before we adjourn?

The Court: Go ahead.

Q. (By Mr. Rashid, continuing) Witness, you participated in raids at this place?
A. I did.
Q. And you saw gambling paraphernalia?
A. I did.
Q. And you made observations of persons coming there, did you?
A. I did.
Q. Civilians in addition to policemen?
A. I did.
Q. Did you in the course of your observations see any of those civilians carrying gambling paraphernalia?
A. I did.

Mr. Rashid: That's all.

Recross-examination.

By Mr. Jackson:

Q. Now, did you see anybody going into that address with gambling paraphernalia?
A. I did.
[fol. 123] Q. And that conclusion that you saw them going into that place with gambling paraphernalia is based not upon what you actually saw, so far as the gambling paraphernalia is concerned, but from the size and the shape of packages that they were taking in there; is that right?
A. I saw the actual gambling paraphernalia, mutuel bet slips.
Q. People taking them in there?
A. That is right.
Q. On how many occasions?
A. Several.
Q. Several?
A. Yes.

Mr. Jackson: I have no further questions to ask the Inspector.

The Court: Very well.

(Witness excused.)

The Court: Let's put one other stipulation on the record so it will be clear, that all of this testimony that has been given by the officers is testimony that grew out of their observations before this Grand Jury was convened, and that no testimoney has been given here which grew out of any inquiry made by the Grand Jury.

Mr. Jackson: I will so stipulate. On the face of it, that's [fol. 124] what it is.

The Court: Very well. Then is that all you have to offer, Mr. Rashid?

Mr. Rashid: That is all, if the Court please.

Mr. Jackson: I would like to ask Lieutenant Ingersoll just one other question before your Honor adjourns so it will help me to get started on some work I have got to do.

The Court: All right.

Claude Ingersoll, was thereupon recalled as a witness on behalf of the People, and having been previously duly sworn, testified further as follows:

Recross-examination.

By Mr. Jackson:

Q. Lieutenant Ingersoll, these pictures that were taken, have they been enlarged? Can you tell me that? Or would that be the natural size of the film?

A. No, that is an enlargement from a frame from the sixteen millimeter film.

[fol. 125] Q. But how much of an enlargement, you do not know?

A. Well, the sixteen millimeter picture actually is only about a half inch square, or possibly a little larger than that. Not very much.

Q. I know, but isn't there some term that photographers use to identify the extent of the enlargement of the picture?

A. There possibly is. I am not positive, I am not sure.

The Court: Isn't it usually referred to as the enlargement or blow-up of a picture?

Mr. Jackson: That's what I am trying to get. I will

tell the Court the reason why I want it, and I think it is important.

I will hope to be able to offer some very pertinent and relevant testimony to this Court relative to these pictures so far as they relate to the respondent here, and to do so, it is important that I know to what extent this enlargement was made, because I am of the opinion that mathematically from the physical structure of that house, we will be able to demonstrate that this picture is not a picture of this respondent, and that's the reason why I am questioning more, and that's the reason I want that information, if I can get it.

Mr. Rashid: May I just point out to counsel, if your Honor please, that if this picture was shown on the screen [fol. 126] it would be obviously many times this size. It would be the size of an ordinary screen that you see.

Mr. Jackson: I am not talking about that. I am talking about in relation to the physical stucture, and this respondent, his physical structure.

The Court: Well, very well. Let's adjourn now until 2:00 o'clock.

(Whereupon an adjournment was taken until 2:00 o'clock P. M. of the same day.)

[fol. 127] Detroit, Michigan,

Monday, May 10, 1954,

2:20 o'clock P. M.

(Whereupon the hearing of this cause was resumed pursuant to the adjournment.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Rashid: May the record again show as we proceed this afternoon, your Honor, that the court room doors are all open. There are spectators present in the court room, and members of the press.

The Court: We will open the door again.

Mr. Rashid: Sir?

The Court: Somebody just closed the front door. We better open it again.

Mr. Rashid: And that the respondent, Lee Roy Murchison, is in the court, represented again by his counsel, Mr. Jackson.

Now, if the Court please, the People have submitted all the proofs that they desire to submit at this time.

The Court: Very well.

Mr. Jackson, do you wish to present proof in the matter? [fol. 128] Mr. Jackson: No, if it please the Court, at this time I am asking again for a continuance. What I intend to show, what I intend to attempt to show, if I am given an opportunity to do so, is that this respondent was not in the City of Detroit on the 9th day of March, but that he was at Rondo, in Ontario, Canada, and I haven't been able to get the witnesses to substantiate that up until the present time.

I also intend to challenge these photographs, not as to the accuracy of what they show, but they do not and could not show a likeness of the respondent here.

For that reason, I need a couple of days, and ask that I be given until Wednesday at 1:00 o'clock to complete my preparation.

The Court: If I understand what you said, Mr. Jackson, you intend to show that the respondent Murchison in this matter was at Rondo Park in Ontario, Canada?

Mr. Jackson: Yes. Just a second. Shrewsberry.

The Court. And then again you are going to show that the picture which has been presented here is not the picture of the respondent?

Mr. Jackson: I hope to be able to do so. And that is a [fol. 129] matter that will call for certain expert testimony as to the picture and the relationship to the structure of the building and the size of this defendant.

Your Honor can understand what those matters will entail, and I haven't had time. I could not work on this matter Sunday for this reason, that I have three adult sons and two other children, and Sunday was the day that they themselves dedicated to their mother, and I joined with them.

I informed Mr. Rashid Friday that under the circumstances it would be absolutely impossible for me to be prepared this morning, and I considered at one time withdraw-

ing from the matter entirely because I would not be prepared. And I am not even prepared to argue as I would wish to, the legal question involved here, because when it goes up, I want it to go up complete, so that this question will be settled once and for all, and we can proceed in the matter.

The Court: There are two points that suggest themselves to me.

One is that if the respondent is going to claim that he was in Shrewsberry, Ontario, Canada, on March 9, 1954, that we ought to be furnished with information so that we could between now and two days from now, which I am going to give you, we could do some checking and investigating ourselves.

[fol. 130] Mr. Jackson: I will give you all of the information. That's the reason why I mentioned definitely where.

We intended to show. I am not going to attempt anything except the discovery of the true facts in this matter. That's all I am going to attempt. And as soon as I get my information, and I expect to have it sometime tomorrow, I will immediately contact Mr. Rashid, give him what I have got, tell him what I propose to show.

I am not going to hide anything.

The Court: Very well.

If you will do that tomorrow, so that——

Mr. Jackson (Interposing): It will be in the afternoon tomorrow.

The Court: Yes. So that Mr. Rashid will have a little bit of time to check. Perhaps that will answer the first point that suggested itself to me.

Now, the next is this, and that concerns the claim that the picture taken is not the picture of the respondent, Lee Roy Murchison. Mr. Rashid, I want to ask you, don't you have a picture of the respondent, a police photograph?

Do you have a double picture, such as is generally taken?

[fol. 131] Mr. Jackson: Profile.

Mr. Rashid: The police department doesn't take profile pictures. They just use a front view.

The Court: I would suggest that whatever picture you have of respondent, Murchison, be marked and put in the record.

(Whereupon a photograph was marked Exhibit 2 for identification by the reporter.)

Mr. Rashid: I will do it with propriety, then, your Honor.

Claude Ingersoll, was thereupon recalled to the stand as a witness on behalf of the People, and having been previously duly sworn, testified further as follows:

Redirect examination.

By Mr. Rashid:

Q. You are Lieutenant Ingersoll?
A. That is right.
Q. You have testified earlier that you have known Patrolman Murchison for ten years?
[fol. 132] A. I would say eight year, approximately that.
Q. I am going to show you proposed Exhibit 2 and ask you if you know who that photograph is?
A. Yes.
Q. Who?
A. That is the police department photograph of Patrolman Lee Roy Murchison.
Q. And police photograph number 6859?
A. That is correct.
Q. Is it the same man who was in court today?
A. It is.
Q. Will you point him out?
A. Seated behind counsel, Mr. Jackson.

Mr. Rashid: Let the record show the witness indicates Lee Roy Murchison.

Do you have any objection?

Mr. Jackson: I have no objection to its being admitted in evidence.

Mr. Rashid: May it be received, your Honor?

The Court: Yes. May I see both of those pictures? I would like to look at them.

Mr. Jackson, how is Mr. Murchison's name spelled?
[fol. 133] Mr. Jackson: M-u-r-c-h-i-s-o-n.

The Court: There is no "n" in it? M-u-r-c-h-i-n-s-o-n?

Mr. Jackson: No, sir. M-u-r-c-h-i-s-o-n.

The Court: Then I think the spelling of the name in the order to show cause should be corrected.

Let us ask one other question. How is his name spelled on the official police records?

Mr. Rashid: I am getting them right now, your Honor. "i-s".

The Court: What?

Mr. Rashid: "i-s".

The Court: M-u-r-c-h-i-s-o-n?

Mr. Rashid: That's how he signs it.

The Court: Well, the order to show cause should be corrected in that respect so that the name is spelled M-u-r-c-h-i-s-o-n, Murchison, and I will make an order to that effect that the spelling of the name will be correct.

Lieutenant Ingersoll, I have here in my hand Exhibit 1-B, which you identify as an enlarged picture of one that was taken by you with a movie camera on March 9, 1954?

[fol. 134] A. That is correct.

The Court: Now, you identified the man in the picture as the respondent, Lee Roy Murchison, did you not?

A. That is correct.

The Court: Is there any doubt in your mind that that is Mr. Murchison?

A. None whatsoever.

The Court: Is there any doubt in your mind that the man sitting beside or behind Mr. Jackson is the same man whose picture is on Exhibit 1-B?

A. None whatsoever.

The Court: The picture on Exhibit 1-B is a profile, is it not?

A. That is correct.

The Court: Does that conform to the profile of Mr. Murchison, who is sitting in the court room?

A. In my opinion, it does.

The Court: Now, I will show you Exhibit 2. Exhibit 2 is a police photograph of Lee Roy Murchison, is it not?

A. That is correct.

The Court: Well, is the likeness shown on Exhibit 2 the same as—not—no, is the likeness shown on Exhibit 2 of [fol. 135] the same person shown on Exhibit 1-B?

A. In my opinion, it is, yes.

The Court: Is there any doubt in your mind about it?

A. None whatsoever.

The Court: That is all I have to ask.

Mr. Jackson: May I inquire, if it please the Court, that in the event I have someone who so wishes to examine these photographs, that Mr. Rashid will make them available?

The Court: Surely, surely. We shall cooperate with you fully, Mr. Jackson, in that respect.

Mr. Jackson: Thank you.

The Court: I think that's all.

(Witness excused.)

Colloquy Between Court and Counsel

Mr. Jackson: I made a request, if it please the Court, for certain papers connected with this investigation. I wanted, I think I said, the petition, the order appointing your Honor, and the order to show cause, and I want it indicated on the order to show cause that the hearing would be before your Honor.

The Court: Doesn't the order to show cause say——

[fol. 136] Mr. Jackson (Interposing): No, it is from the Recorder's Court, and it calls for him to show cause to the Recorder's Court but not before your Honor. It is signed by your Honor as a judge of the Recorder's Court, but in the ordinary course of procedure, such a hearing to show cause might be heard before any judge of the court unless it was otherwise indicated upon the order to show cause.

The Court: Well, I don't like to add something to the order to show cause that wasn't part of the original order,

but if there is any question about the order requiring respondent, Murchison, to appear before me——

Mr. Jackson (Interposing): That's the only thing.

The Court (Continuing): —I will clear it up in any way you want it done.

Mr. Rashid: Well, may I for the record point out, your Honor, that this order, the opening paragraph to the order to show cause sets forth a recital.

(Reading:)

"This Court having heretofore convened in this cause, in accordance with the statute in such cases made and provided, for the purpose of conducting a judicial investigation [fol. 137] into crimes and offenses set forth in the order of the Court, it became and was a material question to this judicial inquiry whether or not certain police officers in the City of Detroit, and other persons, frequented or went to the residence of a known and notorious gambler, to wit, one Edwards Stephen, said residence being known as 945 St. Josaphats Court in the City of Detroit."

Now, that recital indicates very clearly that your Honor is sitting for the purpose of conducting the judicial inquiry. The order is signed by you, and the paragraph in the order says that "it is therefore ordered that said Patrolman Lee Roy Murchison appear before this Court on the 10th day of May, 1954, at 10:00 o'clock in the forenoon, to show cause why he should not be punished for criminal contempt."

Bearing in mind that the order is signed by you, that your Honor is the only member of the Recorder's Court conducting a judicial inquiry into these matters.

The Court: Well, I think it is clear, but if Mr. Jackson wants any assurance of the fact, I will be glad to help him out and give it to him.

[fol. 138] Mr. Jackson: Your Honor, of course your Honor understands what my position is. I don't care what that order says.

It reads just as it does. It is my contention that such an order issuing out of the Recorder's Court in the natural course of things would go to the Presiding Judge, and that

it could be heard, that this—it could not be heard, that this Court directed his appearance before you.

The Court: There is no doubt about it, and all the physical facts, I think, show that it is to be heard right here.

Mr. Jackson: That is a fact, if it please the Court, but if anybody picks this order up, I want it to readily be seen that this order issued out of this Court and directed the respondent to prepare to appear not only in this court, but before a particular judge of this Court.

That's all I want.

The Court: Well, all right. Now is there any other proof that you wish to present now?

Mr. Jackson: None.

The Court: And you have requested that we adjourn this matter for two days, which would be 2:00 o'clock on Wednes- [fol. 139] day, May 12th?

Mr. Jackson: Yes, your Honor.

The Court: Have you anything to say about that, Mr. Rashid?

Mr. Rashid: 2:00 o'clock Wednesday?

The Court: Yes.

Mr. Rashid: I think that's a satisfactory time, your Honor.

The Court: Very well. We will adjourn this particular matter now until Wednesday, May 12th, at 2:00 o'clock.

And in the meantime, Mr. Jackson, you will apprise Mr. Rashid of whatever information you have about Mr. Murchison being in Shrewsberry, Ontario on March 9, 1954.

Mr. Jackson: I will attempt to have the witnesses go to him to be interviewed.

The Court: All right. Now, that will conclude the Murchison matter at this time. We have another matter now.

(Whereupon an adjournment was taken until 2:00 o'clock P.M., Wednesday, May 12, 1954.)

[fol. 140] EXHIBIT TO CONCISE STATEMENT OF FACTS AND PROCEEDINGS

STATE OF MICHIGAN IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

No. 79821 Miscellaneous

In Re: Contempt Proceedings Against Lee Roy Murchison

Transcript of Proceedings

Proceedings had and testimony taken in the above-entitled matter before the Honorable John P. O'Hara, Judge of the Recorder's Court, at Detroit, Michigan, on Wednesday, May 12, 1954.

APPEARANCES:

Joseph G. Rashid, Assistant Prosecuting Attorney, and Samuel J. Torina, Assistant Prosecuting Attorney, Appearing on behalf of the People. James Jackson, Sr., Appearing on behalf of the Respondent.

[fol. 141] About 2:05 o'clock P.M.

(In open court)

(The hearing of this matter was resumed pursuant to the adjournment.)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: When we adjourned on Monday, we had in part heard the Lee Roy Murchison matter. Mr. Jackson, you were going to see if there was proof that you could find about whether or not your client, Mr. Murchison, was in Detroit on the day that was indicated by the testimony of the officers.

Now, you may proceed now with any testimony you wish to place before the Court, in this matter.

Mr. Jackson: If it please the Court, in view of the fact that on the 16th day of March of this year, and an application was made to the Recorder's Court by the Prosecuting Attorney for Wayne County for the appointment of a so-

called one man Grand Jury to investigate certain crimes and misdemeanors in the City of Detroit, and in view of the fact that the Recorder's Court appointed the Honorable John P. O'Hara as Grand Juror to conduct such investigation, and in view of the fact that an order issued out of the Recorder's [fol. 142] Court on the 6th day of March directed to the respondent here, Lee Roy Murchison,—the 6th day of May, I am mistaken as to the date—that he so appear and show cause why he should not be adjudged in contempt of the court for giving false answers to certain questions which were propounded to him in the Grand Jury investigation.

And in view of the fact that he appeared in obedience to that order at the time and place specified therein and was informed that the Honorable John P. O'Hara, the Grand Juror, appointed by the Recorder's Court to conduct the investigation, was to hear and determine the issues involved in the order to show cause, and in view of the fact that he then and there protested the proceedings for the reason that the Grand Juror to hear such order to show cause would be a violation of the provisions of the statute regulating the one man Grand Jury—at this time we most respectfully decline to proceed further in this matter and ask that the respondent be relieved from so proceeding.

The Court: In response to your request, Mr. Jackson, I will state that this Court elects to proceed in the same manner and for the same purposes as were discussed here on Tuesday—or, Monday, rather, when the hearing began. [fol. 143] In line with that action, you may proceed now to introduce any testimony that you wish to present on behalf of the respondent you represent, Lee Roy Murchison.

Mr. Jackson: If the Court please, at this time and for the reasons before stated, the respondent elects not to offer any testimony whatsoever.

The Court: I would like to have the record show very clearly so that if this, if disposition is made of this matter by a higher court that the respondent through his attorney has declined to offer any testimony and is, I assume, willing to stand upon the record as it is. I make this statement because if a higher court's action is adverse to your client, you might then want to present testimony, but I want this record

to show very clearly that you have the opportunity to do it now so that later there will be no question about whether or not you did have an opportunity to do it in open court.

I want the record to show also at this time this court room is open to the public, it is, as it was on Monday last when the hearing proceeded, that the respondent is here and he is represented by his counsel, and that he has been offered an opportunity to present any testimony which he may wish to place upon the record in his defense.

[fol. 144] Now, I will ask you another question, Mr. Jackson. Have you any legal arguments that you wish to present to this court?

Mr. Jackson: No, your Honor, not at this time.

The Court: I ask you this question also, in view of further proceedings, I want to give you an opportunity to present any arguments you may have to this Court so that if you get into another court you won't be met with the proposition that you cannot raise matters in the higher court, the Supreme Court, that were not raised in the Recorder's Court.

I don't know whether you have that in mind or not, but in giving you this opportunity to present your case, I wish you would take that into consideration, because the question might arise later about points you wish to raise, and if you made no effort or offer to raise those points in this Court, you might be barred from raising them in another court.

Mr. Jackson: I believe, and it is my intention, if it please the Court, to make very plainly understood the position of the respondent here.

It is his position that the provisions of the statute, disqualify the Grand Juror to preside in any proceedings in the [fol. 145] nature of contempt growing out of his Grand Jury investigations.

That is the position that the respondent takes, now, and it is the position that he has always taken in this regard.

The Court: Do you wish to——

Mr. Jackson: If it please the Court, so that there will be no misunderstanding, may I have a copy of the Annotated Statute, 28.945.

(Brief pause.)

The Court: Here is the volume, Mr. Jackson.

Mr. Jackson: Thank you, your Honor.

I wish to direct the Court's attention particularly to Section 28.944, of the Michigan Statutes Annotated, and for the purpose of the record include that entire section, particularly the following.

(Reading.)

"Provided that the Judge conducting the inquiry under Section 3 of this Act, shall be disqualified from acting as the Examining Magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom or from hearing any motion to dis- [fol. 146] miss or quash any complaint or indictment or from hearing any charge of contempt under Section 5 hereof."

I wish to address myself specifically to that.

It is the position of the respondent here that under the express terms of that statute, the Grand Juror is prohibited from conducting any proceedings growing out, or any contempt proceedings growing out of this investigation.

Further, that the order, that is, the order to show cause, violates the due process clause of the constitution in that the respondent is not given an opportunity to have formal indictment filed against him, specifically setting forth the charges to be proved.

Third, that the Court is without authority, either by statute or any theory of the common law, to cite the respondent for contempt expressly in view of the provisions of the statute forbidding such action. And, of course, that the statute, itself, is unconstitutional in that it departs from the ordered scheme of personal liberty established by the bill of rights and in that connection, I would like to say, make this observation, that this entire one man Grand Jury Act, is in itself, in its very essence repugnant to our [fol. 147] ideals of justice and due process of law, in that having these extraordinary powers granted by the statute, and reposing the authority in one person, it departs completely from the concept of Grand Jury investigations as known to the common law, and the provisions of this statute disqualify a judge from sitting in contempt proceedings, is no more or no less than a re-statement of what

I contend has always been the law, that a Grand Jury or any investigation of this kind cannot try any issue growing out of that investigation.

Your Honor, pardon me just a second.

(Brief pause.)

Mr. Jackson: There is a further observation that I wish to make, if it please the Court. And that is that this is a criminal contempt, and the respondent, and I am making this addition at the advice of gentlemen who have been associated with me in this matter, that this being a criminal contempt, the respondent is denied the due process of law and denied the equal protection of the law by leaving to the committing functionary such discretion as to the scope and contents of the record on appeal, and if the Court will allow me, at this time, I wish to move that the entire transcript of the testimony of the respondent here be made a part of the record in this Court.

[fol. 148] Any further suggestion you may have, Mr. Jones?

For those reasons, if it please the Court, I submit that the Court should disqualify himself from hearing this matter and should discontinue these proceedings then refer the same to the Presiding Judge of the Recorder's Court for assignment to some other judge for hearing.

The Court: Mr. Jackson, just to help you make your record more complete, I think it would be well if you would read into this record Section 5 that you referred to.

Mr. Jackson: Yes, if it please the Court.

May we include, if it please the Court, all of Section 943.4, 1, and 5, of the Michigan Statutes?

The Court: They will be considered included, but I think you ought to read Section 5.

Mr. Jackson: (Reading.)

"Any witness neglecting or refusing to appear in response to such summons or to answer any questions with such judge may require as material to such inquiry, shall be deemed guilty of a contempt and after a public hearing in open court and conviction of such contempt, shall be punished—"

[fol. 149] As set forth in the statute. Do you want me to read the punishment, also?

The Court: No,—is it part of that Section 5?

Mr. Jackson: Yes, it is.

The Court: Oh, yes, read all of Section 5.

Mr. Jackson: (Reading.)

"—by a fine not exceeding one thousand dollars or imprisonment in the County Jail not exceeding one year or both at the discretion of the Court: Provided, that is such witness after being so sentenced shall offer to appear before such Judge to purge himself of such contempt, the Judge shall cause such witness to be brought before him, and, at the examination of such witness, the Judge may in his discretion commute or suspend the further execution of such sentence."

The Court: Is there any other appearance to be entered for Mr. Murchison besides yours, Mr. Jackson?

Mr. Jackson: At the present time?

The Court: Yes.

Mr. Jackson: No.

[fol. 150] The Court: I would like to briefly make a statement for the record.

First, concerning the manner in which the respondent, Murchison, has been notified of this hearing, which is set forth in the order to show cause.

The Court has gone to great lengths to completely apprise the respondent of the charge which is made against him. It is specifically stated that he falsified in saying that he was not at number 945 St. Josaphats Court, and in addition to that, the names of the witnesses who have testified that he was, are set forth very clearly.

It seems to me that the notice of the hearing is as complete as could be given.

In addition to that, a time was set for the hearing of the contempt proceedings which, under the statute, is considered a summary one, and such time was given to the respondent to obtain counsel and appear.

In addition to being notified of the charges against him and being given time to appear with counsel, the court room is wide open and the matter is being heard as a public one.

This is all done in compliance with decisions which have

been rendered concerning the so-called One Man Grand Jury [fol. 151] law.

In addition to those matters, I have granted sufficient time for the presentation of objections to the proceedings, and have also invited legal arguments.

The record should show that the only legal argument, the only legal argument that has been presented is a reading of the statutory provisions involved here, and the record should show that no authority has been cited to the Court on the point which the Court raised on Monday, to the effect that the right to hear contempts *and* is an inherent one, and one that may not be taken from the Court by the Legislature.

I am a little disappointed that counsel have not presented any law on the subject, but, that is a course of their own choosing and I cannot compel them to do so.

I have striven here to make as complete a record as possible so that if the matter is reviewed in the Supreme Court, the record will show everything that has been done and show the manner in which the Court has been conducted.

Well, if you have nothing further to offer in the matter of Lee Roy Murchison, Mr. Jackson, we will consider the session with respect to him closed for today.

I expected that some law would be presented which I [fol. 152] might be required to study, and I intended, intended to and intend to write an opinion of my own.

Mr. Jackson: May I ask this, if the Court please. I would be very happy to submit a brief on every question that I think pertinent to this matter, but time has forbidden me doing so in such shape that I could present it in the manner that I would like to present it.

I do not know how long your Honor intends to continue this matter but if it is until Monday of next week, I would be very happy to fully explore, at least, three points.

One, the constitutionality of this entire Act;

Two, the right of the Legislature to abridge the inherent right which I concede that the Court has to punish for contempt, and on those two points, especially, I would like to go into, and would be very happy to do so.

But, as I explained to your Honor, on the first day of these hearings, that these are things that require considerable time, and it seems to mean putting aside everything

else that you are doing, and that is very important, I never anticipated that it would be heard, it is very important, its very importance is the thing.

Friday, when I came over to talk to Mr. Rashid, I asked [fol. 153] him could I have a week's adjournment—that was Friday when I was first retained here in this matter, because, I can't do anything in a hurry. I am not one of the bright boys who can just snap their fingers, and I don't have a large staff to do my briefing for me.

I would be very glad to go into it unless there was some particular urgency of terminating this proceedings.

The Court: Well, haven't you made any study of the law at all?

Mr. Jackson: Oh, yes, your Honor.

The Court: I didn't expect that you would have a brief prepared for me, but I expected you would have some argument of some sort supported by some legal decisions or legal works; but, if you haven't and don't wish to present anything at this time, then, I will consider the matter closed.

Mr. Jackson: Very well, your Honor.

(Brief pause.)

Mr. Jackson: If it please the Court, may I inform the Court that a brief on this question is being prepared now, and——

(Brief pause.)

The gentleman who has been interested with me in this [fol. 154] matter, has vetoed that suggestion, so, I am stopped there.

The Court: Now, what is it you started to say, you started to say something?

Mr. Jackson: No, sir.

The Court: Then, you withdraw it—you withdrew it when Mr. Jones shook his head.

Mr. Jackson: I don't know.

The Court: Well, we will take up the matter of John Marshall Eberhardt.

Mr. Rashid: Do we understand, then, for the purpose of the record, that the matter with respect to Mr. Murchison is now closed, your Honor?

The Court: Yes.

Mr. Torina: You will take it under advisement?

The Court: Yes, and if you will wait, you will probably, Mr. Jackson, you will probably wait until this next matter is taken up, then, I will be able to say just when I will be ready to proceed further.

Mr. Jackson: Very well, your Honor.

(Thereupon an adjournment was had in this matter until 11:00 o'clock A. M., Friday, May 14, 1954.)

[fols. 155-156] EXHIBIT G—TO CONCISE STATEMENT OF FACTS AND PROCEEDINGS

STATE OF MICHIGAN IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

No. 79821 Miscellaneous

In Re: Contempt Proceedings Against LEE ROY MURCHISON

Transcript of Proceedings

Proceedings had and testimony taken in the above-entitled matter before the Honorable John P. O'Hara, Judge of the Recorder's Court, at Detroit, Michigan, on Friday, May 14, 1954.

APPEARANCES:

Joseph G. Rashid, Assistant Prosecuting Attorney, and Samuel J. Torina, Assistant Prosecuting Attorney, appearing on behalf of the People.

James Jackson, Sr., appearing on behalf of the Respondent.

[fol. 157] About 11:00 o'clock.

(The hearing of this matter was resumed pursuant to the adjournment.)

(In open court)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: The record in this matter should show that this is a public hearing, that the doors of the court room

are wide open and that any person who desires to enter the court room is at liberty to do so.

This is a continuation of the hearing that has been in progress here in which Lee Roy Murchison has been ordered to show cause why he should not be adjudged guilty of contempt of court.

Now, have you anything further to say, Mr. Rashid?

Mr. Rashid: If your Honor please, I should like to introduce in evidence additional exhibits, being additional photographs of the respondent here, Lee Roy Murchison, I would like to have them marked. If you will mark them, Mr. Reporter.

(Thereupon People's Exhibits 3, 4, 5, 6, 7 and 8 were marked by the court reporter.

[fol. 158] Mr. Rashid: May I recall Lieutenant Claude Ingersoll to the stand, if the Court please, for the purpose of identifying these exhibits.

The Court: Yes.

Claude Ingersoll, was thereupon recalled as a witness on behalf of the People, and having been previously duly sworn, testified further as follows:

Redirect examination.

By Mr. Rashid:

Q. Now, witness, your name is Lieutenant Claude Ingersoll?

A. That is correct.

Q. And you were in the year, 1954, and as you have already testified, making observations at an address known as 945 St. Josaphats Court in the City of Detroit?

A. I was.

Q. You have already testified, Lieutenant, have you not, that while there on March 9, 1945, you also took photographs with a sixteen millimeter camera?

A. Not 1945, 1954.

Q. Thank you. In 1954?

[fol. 159] A. Yes, sir.

Q. With a sixteen millimeter camera?

A. I did.

Q. You testified they were developed?

A. I did.

Q. And that you did take photographs of respondent, Lee Roy Murchison?

A. I did.

Q. All right. Now, I am also going to show you, Lieutenant, proposed Exhibit 3, proposed Exhibit 4, and proposed Exhibit No. 5, and ask you whether or not those are reproductions of photographs taken of the respondent, Lee Roy Murchison on that date?

A. They are.

Q. And does the photograph show the respondent's front view or back?

A. The back view.

Q. Back view. Now, at the time you took that photograph, where was he, what was he doing?

A. He had just left the premises of 945 St. Josaphats and was walking west towards Hastings Street on St. Josaphats. He is in front at 945 and walking at this time.

Q. He is in front of 945 St. Josaphats at that time?

A. That is correct.

[fol. 160] Q. Now, does the photograph show the identical picture of the physical structure there, the building, the dwelling, the fence, and so on?

A. It does.

Q. It does. Now, Lieutenant, you have testified, already that you have know- the respondent, Lee Roy Murchison, for how many years?

A. I can't recall exactly, it is back about 1945, or 1946, or somewhere in that vicinity. I haven't checked, but it was quite a few years ago.

Q. All right. Now, Lieutenant, I am going to show you proposed Exhibit 6, 7 and 8, and ask you whether or not these views were taken of the respondent at that time?

A. They were.

Q. And what portion of the house is this (indicating)?

A. This is, would be the front corner of the house on the east side,—let's see, that would be the southeast corner of the house, that is the eavestrough showing there, the view would be the southeast corner right next to the porch.

Q. And they are photographs of the respondent, Lee Roy Murchison?

A. They are.

Q. And the physical structures that you have indicated, [fol. 161] that is the corner of the house, are identical with those that you were observing at that time and taking moving pictures of, are they not?

A. They are.

Q. All right.

OFFERS IN EVIDENCE

Mr. Rashid: I am going to offer Exhibits 4, 5, 6, 7, and 8.

(Handing Exhibits 4, 5, 6, 7 and 8 to counsel.)

Examination.

By Mr. Jackson:

Q. When were these developed, Lieutenant?

A. Those were developed two days ago.

Q. Since you testified in this case before these were developed, weren't they?

A. They were developed from the roll of film.

Q. Were they retouched?

A. They have not been retouched.

Q. They are much more distinct than the other pictures that you introduced that were introduced in evidence here before, aren't they?

A. I don't believe so.

[fol. 162] Q. Look at them. Have you got the others that were introduced in evidence there?

(Counsel handed above referred to exhibits.)

Q. (By Mr. Jackson, continuing) Look at that picture, and compare it with the picture which is being introduced in evidence here now?

A. The only thing that is on this picture here was developed a little too much, overdeveloped, it is too dark. These here were not developed quite as much. (Indicating). In other words, they were a little lighter.

Q. Are you an expert on photography?

A. No sir, but I saw the pictures.

Q. Are you an expert on the development of photography?

A. No, but I know what happens when they overdevelop film.

Q. My question is, that these pictures that you have here this morning are much more distinct than the pictures which were here introduced in evidence in this cause, aren't they?

A. I would say that they are in relation to this one picture here, there is no number on it.

Q. That is all I am talking about.

A. You also have some other pictures, Mr. Jackson, that I would say pretty much the same distinction, there, as far as being developed.

Q. This picture, Exhibit 8, was that picture taken at the [fol. 163] same time all of the other pictures were taken?

A. That is a print that is made from that same roll of film that was taken all at the same time.

Q. Where is the negative to these pictures?

A. They don't make negatives, they just blow that up from the roll.

Q. Who has the roll?

A. I do.

Q. You will notice on the back of those three pictures, the notation "5-14-54" (indicating)?

A. That is right.

Mr. Rashid: Let's mark this for the purpose of identification, shall we.

Mark that 2-A, will you?

(Thereupon People's Exhibit 2-A was marked by the court reporter.)

Mr. Rashid: Refer to this one as Exhibit 2-A. I will agree that that one was one of the exhibits introduced on Wednesday of this week.

Q. (By Mr. Jackson, continuing): Referring to Exhibit 2-A and Exhibit No. 8, I ask you whether or not those two pictures are reproductions of the original from the original film which was used in taking these pictures?

A. They are, yes, sir.

[fol. 164] Q. There is no way for you to determine from looking at these pictures whether or not they are both blown up, of any particular piece of that film, is there?

A. The only way I could do that, Mr. Jackson, would be to sit down and compare the roll of film and compare the pictures with the roll of film against the pictures to tell exactly whether they were the same. In fact, I can see they are not the same frames, they are taken from the same roll of film but they are not the same frames on that roll because the head is moved in a different position.

I can explain something else if you wish, here—when these last pictures—

Q. (Interposing) Just a minute. I didn't ask you.

A. All right.

Q. I want you to look at Exhibit 1 and ask you to compare Exhibit 1 with Exhibit 8.

A. That is not the same frame, no sir. The head is in a different position.

Q. But they are from the same roll of film?

A. They are, yes, sir. Every one is from the same roll of film.

Q. Who blew these up?

A. I dealt with a man by the name of Mr. White, at the McGregor Company.

[fol. 165] Q. Give him any instructions about it?

A. I gave him instructions when he developed this last one, I said that some of the first ones he developed were a little dark, and asked him to make them a little lighter, to bring out the facial features.

Q. Who had possession of the original film?

A. Well—

Q. Who had possession of the original film between the time the first pictures were blown up and the second pictures were blown up?

A. I did.

Q. Any retouching done on that film?

A. No, sir, absolutely nothing has been touched on that roll of film.

Q. So that your explanation of the difference in the lighting and shading on these two pictures is that it is caused by something that was done in the development process, is that right?

A. That is absolutely right.

The Court: Let me see those pictures.

(Handing Court pictures.)

Q. (By Mr. Jackson, continuing) I believe you answered on direct examination that the physical surroundings are shown, and are a true representation, that is, on Exhibit 4? [fol. 166] A. They are true representations as they were that day when the picture was taken, yes, sir.

Q. Now, this fence that is in front of what address?

A. That is the fence and a gate in front of 945 St. Josaphats.

Q. On this roll of film that you have, any picture of the subject represented on Exhibit 3, have you any picture of that subject entering or leaving that gate?

A. No, sir.

Mr. Jackson: If it please the Court, I am interested, now, in the development of these pictures. I see two entirely different set ups there. That is, the person's features in this second batch of pictures that have come in here are in my opinion, and I say this is an unexpert opinion, I know nothing about photography, but from looking at them, it either shows —I will put it this way:

In looking at them, they are different, particularly as to the features of the person on the pictures. As to the light that is cast upon them.

The Court: Let me see the pictures.

Mr. Rashid: He is referring now, for the purpose of the record, if the Court please, to Exhibit 4, Exhibit 5—just a minute—he is now referring specifically to Exhibit 6, 7 and 8.

[fol. 167] Mr. Jackson: As compared to exhibits which were produced and introduced in evidence here on the 10th, I believe.

The Court: May I look at them and compare them.

(Counsel hands photographs to the Court.)

The Court: I have here Exhibit 6 and Exhibit 7 and Exhibit 8, those are pictures that were introduced this morning.

Mr. Rashid: That is right, your Honor.

The Court: Now, what pictures do you compare them with? What other exhibits?

Mr. Rashid: Exhibit 1-A, 2, —

Mr. Jackson: Exhibit 2, 2-A, Exhibit 1, and Exhibit 1-B.

The Court: Let me see those, also.

(Counsel hands the Court photographs.)

The Court: Well, I have before me Exhibit 7 and Exhibit 2-A, one is a dark, darker picture than the other, but I cannot see anything in the pictures that are different except that Exhibit 7 is not as dark as Exhibit 2-A.

Now, I am not an expert, I am not even an amateur, but I have developed pictures, and I do hold one of these instan- [fol. 168] taneous developers, and I know from my own experience with it, that if you leave the picture in the developer after it is taken three or four seconds too long, you get a dark overexposed picture.

But, if you take it out earlier, to get a lighter, clearer picture—

I would be inclined to say that the only difference I can see between Exhibit 7 and Exhibit 2-A, is that one, that Exhibit 2-A was exposed a longer period of time than Exhibit 7, which resulted in Exhibit 2-A being darker; but, outside of that, it seems to me that everything else in the picture is exactly the same.

The face appears to be exactly the same, except that in one it is darker than the other. That applies to the wall of the building, too.

Mr. Jackson: That is correct, your Honor.

The Court: Isn't that true? If you look at those pictures, Mr. Jackson, I think you will see that they are, all of the features of the pictures, the physical picture, appears to be the same except that Exhibit 7 is a lighter picture which in

my opinion, as an amateur, was entirely, would be due to the time of the exposure in the developing.

Mr. Jackson: Pardon me just a moment.

[fol. 169] (Brief pause.)

Mr. Jackson: There is only one roll of film?

A. Pardon?

Q. (By Mr. Jackson, continuing) There is only one roll of film?

A. There is a negative, Mr. Jackson, and then there is a positive. There is two, actually—well, I should say, three made out in this way: I took two rolls of film on this subject here, and they are spliced together in now what is one roll of positive, it is spliced, so it actually has three rolls right now. I actually have three rolls right now in my possession.

Q. All referring to this subject?

A. Well, they would, there would be two rolls that would refer to this subject here, positive and a negative.

Mr. Jackson: I believe that is all.

Mr. Rashid: Now, then Mr. Jackson, if you have no objection to these being received in evidence—?

Mr. Jackson: I am in a quandary about these second pictures. Knowing nothing about photography, the question is in my mind, that is in my mind is this: These pictures have been developed since this hearing was adjourned, and blown up or whatever is done to them, showing in much more detail the features of the subject.

[fol. 170] Mr. Rashid: (Interposing) Can I interrupt you? You are now referring specifically to Exhibits 6, 7 and 8.

Mr. Jackson: Showing much more in detail than the others the features of the subject arouses in my mind this question: Whether or not the person who took, who developed the pictures might not be able to tell us something about the development of them.

I think in all fairness to the respondent and to the court, we should have something from him relative to the difference in these two pictures.

And for that reason, if it pleases the Court, until such time

as we are presented with this witness, I shall object to the introduction into evidence of Exhibits 6, 7 and 8.

Mr. Rashid: Then you have no objection to Exhibits 3, 4 and 5?

Mr. Jackson: No objection to Number 2, 3, 4 and 5, and in regard to Exhibit Nos. 3, 4 and 5, I believe I asked you whether or not, about this fence and where it was?

The Witness: Yes, sir.

Mr. Jackson: No objection to those.

[fol. 171] The Court: Now, with reference to Exhibits 6, 7 and 8, I have examined them. Since they appear to be the same pictures that were previously introduced, and since the pictures previously introduced have been identified, and since the two witnesses, Inspector Heath and Lieutenant Ingersoll have both identified the figure shown there as the respondent, Lee Roy Murchison, I don't think it is necessary to take further testimony with respect to the pictures.

So, I will rather then take the time to have further proof regarding the development, I will admit them in evidence for what they are worth, since to me it is quite clear that the pictures were taken from the same negative but some are developed a longer period of time than others.

Mr. Rashid: I have one or two more questions, your Honor.

Redirect examination.

By Mr. Rashid:

Q. I am referring to Exhibits 3, 4 and 5. Now, witness, I invite your attention specifically to the human subject [fol. 172] in the photographs, it is a photograph of his back and the back of his head, is it not?

A. That is right.

Q. He is walking away from the camera at that time?

A. He was walking away, he is on a slight angle, yes.

Q. Now, do you note any peculiarity or anything, any significant characteristic with respect to the subject's head?

A. Yes, he has a slight bald spot which showed up quite prominently in the photogaph.

Q. Do you know as a matter of fact, whether or not the

respondent here has such a bald spot as appears in the photograph?

A. I do.

Q. You know that of your own knowledge?

A. I do.

Q. All right.

Cross-examination.

By Mr. Jackson:

Q. I have a bald spot, also, don't I, isn't that right, Lieutenant Ingersoll?

A. Slightly bigger, yes, sir.

[fol. 173] Q. And that physical feature is common to great numbers of men, that is true, isn't it?

A. Yes, sir.

Q. Common to Lee Roy Murchison, you say?

A. Well, I don't know whether he is common, he has one.

Q. Well, he has one. I have one?

A. Yes.

Q. And you know thousands of other men who have them, don't you?

A. Oh, yes, sir.

Mr. Jackson: I believe that is all.

The Court: Is that all, Mr. Rashid?

Mr. Rashid: That is all.

The Court: Very well.

(Witness excused.)

Colloquy Between Court and Counsel

Mr. Rashid: That concludes the testimony that the People have to offer at this time, if the Court please. Strike that, "at this time".

That concludes the testimony we have to offer.

The Court: I see.

And I take it for granted, Mr. Jackson, I have in mind your statement of Tuesday or Wednesday, rather, that you have no testimony to offer?

[fol. 174] Mr. Jackson: I have no testimony to offer, if it please the Court, as I said at the time this matter was ad-

journed. We have no testimony to offer at this time, and I wish to reiterate the position taken by the respondent in this matter, and urge upon the Court that a person should be able to rely upon the plain, unequivocal language of the statute of his state, and to submit this question to your Honor.

Whether or not the burden of showing such statute to be in violation of the fundamental law is not upon the party making such an assertion?

Therefore, the respondent, Lee Roy Murchison, relying upon the plain, unequivocal language of the so-called One Man Grand Jury Statute, has taken, as to procedure in trials for contempt of such Grand Jury, again protests these entire proceedings as being in violation of the law in such cases made and provided.

The respondent, Lee Roy Murchison, requests the permission of the Court that he be released from any further participation in this matter.

The Court: Mr. Jackson, the Court has given considerable consideration to the question that is now before the Court.

Fundamentally that question is: Can the Legislature of [fol. 175] the State take from a Court which has full, complete and plenary powers to cite for contempt, to hear *de*tempt, and punish for contempt, a power which has been inherent in courts from time immemorial. I believe some of the cases state that this right existed even before the Magna Carta, and that is supposed to be the real foundation of civil rights with respect to England and the common law of England which forms part of the law of this state.

In my study of the situation, I have been confirmed in my belief that such an inherent power cannot be destroyed or removed by the Legislature.

I have written an opinion on this matter, and I hoped that at this moment I would be able to file the opinion and give you a copy of it. It is in the process of being typed and probably will be completed within/ the next half or three-quarters of an hour.

In view of that, I shall not attempt now to go into the detail of all the reasons that are given for the position I take, which is that this Court has inherent power as well

as power granted by the Legislature to hear and punish for contempts and that such power still exists untouched in this Court.

You also mentioned a day or so ago that the act under which this investigation is being held is unconstitutional. [fol. 176] That question of constitutionality of this act has been before the Supreme Court so many times that I firmly believe it is completely at rest now in the State of Michigan.

In my opinion, I have cited and quoted from the matter of In Re Slattery, which was decided by the Supreme Court of this State, and is in volume 319, Michigan Reports. There the Supreme Court said that the matter had been decided a number of times and cited, I think, something like twelve decisions, in which the Supreme Court had said that the law was constitutional.

Then, in concluding, if I remember, Justice Butzel's opinion, he said that he hoped that this statement in the Slattery case will now put the matter at rest and be a determination of the legal status of Grand Juries under the so-called one man Grand Jury Statute.

So in view of that position and the many decisions on the subject, I also hold that the Statute is constitutional.

That brings the Court to the question of guilt or non-guilt of the respondent, Lee Roy Murchison.

The proof in the matter is so clear that there can be no doubt whatsoever but that Lee Roy Murchison did visit the home of Indian Steve Stephen in the month of March, [fol. 177] 1954, and particularly on March 9, 1954.

He stated under oath a number of times that he did not.

The Court finds that in so testifying, Lee Roy Murchison testified falsely and in so testifying was guilty of contempt of the Court.

I shall proceed, then, to impose sentence upon the respondent, Murchison. And the sentence is that——

Mr. Jackson: (Interposing.) Do you wish him to stand?

The Court: Yes, I would.

(Whereupon the respondent stands before the bench.)

The Court: The sentence of this Court, Mr. Murchison, is about to be pronounced; in accord with the statutory

provision and also custom, I feel I should ask you if you have anything to say on your own behalf at this time?

Mr. Jackson: If it please the Court, in behalf of the defendant, the respondent, Lee Roy Murchison, I wish to direct this question to the conscience of the Court:

Should a person be deprived of his liberty or property as punishment in proceedings which he contends is against [fol. 178] the plain and unequivocal law of the State of Michigan, even though the Court, trying such matter, should be of the opinion that the law is unconstitutional until such time as he is given an opportunity or until such time as the Court of last resort has had an opportunity to pass upon that question?

With that, he has nothing else to say.

The Court: Mr. Rashid, do you have that statute on the table there? Section 28.945?

Mr. Rashid: We will get it for you.

The Court: Let me take that copy you have, Mr. Rashid. That will be sufficient for what I wish to say.

(Mr. Rashid hands papers to the Court.)

The Court: Mr. Jackson, you have repeatedly said that the offense with which respondent, Murchison, is charged is against the plain, unequivocal language of the statute. Now, I want to call your attention to something.

Mr. Murchison is charged with falsifying his answers to questions put to him in this Grand Jury proceedings.

Now, I will read Section 5, which is Section 28.945 of the Michigan Statutes Annotated.

[fol. 179] (Reading.)

"Any witness neglecting or refusing to appear in response to such summons or to answer any question which such Judge may require as material to such inquiry, shall be deemed guilty of the contempt,—" etcetera.

I want to call your attention to this,—that the contempt you refer to is in not answering questions. That is all there is in Section 5, and that is all that the provision in Section 4 refers to when it states that.

"A contempt hearing for any of the matters set forth in Section 5 should be held before another Judge."

Pespondent Murchison is charged with falsely testifying, and I want to call your attention to the fact that there is nothing in either Section 4 or Section 5 of the act which mentions giving *false* testimony at all.

In the opinion that I have written, I have mentioned that, but that is not a certain reason why I believe the statute does not apply to the present situation, and if it does apply, then it is void. I just want to call that to your attention.

SENTENCE

The sentence of this Court, Lee Roy Murchison, is that [fol. 180] in pursuance of being found guilty as charged, you shall be confined in the County Jail of Wayne County for a period of sixty days. Although, I have the power to impose a much stronger sentence and also to impose a fine, I shall not impose any fine and the sentence shall be confined to imprisonment only.

So, the officer will take Mr. Murchison in charge.

Mr. Jackson: If it please the Court, may *he* have a stay of this sentence pending appeal to the Supreme Court and ask your Honor to set a bond in this matter?

I tell the Court without any reservation that this matter will be appealed.

The Court: Mr. Rashid, I feel I should ask you for your opinion on that question.

Mr. Rashid: Your Honor, your Honor has a right under the statute in your discretion to fix bond, and the appeal on the part of this respondent, counsel has indicated that he contemplates an appeal—I assume that, counsel will act with dispatch in prosecuting his appeal, is that your contemplation, Mr. Jackson?

Mr. Jackson: We presently will.

The Court: I have no desire to be harsh in the matter or to deprive the respondent, Murchison, of his liberty [fol. 181] now, if this question is to be appealed to the Supreme Court of this state.

In view of the statute that we have, and in view of Sections 4 and 5 of the Grand Jury Statute, I am of the opinion that the questions about those sections which exist should be determined by the Supreme Court as early as possible.

If in view of your statement, Mr. Jackson, that you intend to appeal this matter to the Supreme Court, and I assume you intend to do it speedily?

Mr. Jackson: As speedily as possible.

The Court: I will exercise the discretion I have, and I will fix bail now.

Mr. Jackson: In regard to the bail, if it please the Court, the respondent, Murchison, has lived in the City of Detroit for a great number of years, and heretofore has borne a good reputation. He is married, father of three children, and is purchasing real estate in the City of Detroit.

I submit to the Court that so far as the security is concerned, for his appearance to submit to the jurisdiction of this Court, in my opinion, knowing him over a period of years and knowing his family, there is no doubt whatsoever.

[fol. 182] The Court: In considering this question of bond, I take it, I take into consideration the case is going to be appealed, and that there will be expenses connected with it. That is why I did not like to impose a fine in this matter.

Likewise, with respect to the bond, I don't want to be putting any expense upon the respondent, undue expense, and his bail will be a personal bond in the amount of $2000.00.

Mr. Jackson: Thank you, your Honor.

The Court: That bond will be prepared and filed, I believe, with dispatch?

Mr. Jackson: Yes, your Honor.

The Court: So that respondent will not be required to go to the County Jail?

Mr. Jackson: Yes, your Honor.

The Court: Pending a decision of the Supreme Court in this matter.

Mr. Jackson: That is right, your Honor. Thank you, your Honor.

(Thereupon the hearing of this matter was concluded.)

[fols. 183-185] Stenographer's Certificate to foregoing transcript omitted in printing.

[fol. 186] In the Supreme Court of Michigan

In the Matter of the Appeal of Lee Roy Murchison, for Contempt

Opinion—Filed July 6, 1954

Before the Entire Bench

Boyles, J.:

This case is companion to *In re* White, heard herewith, both cases being appeals from sentences for contempt, on leave granted by this Court. The record here, by stipulation, consists of the application for leave to appeal, briefs, exhibits and testimony filed here on which leave to appeal was granted. The cases mainly involve the same questions and were argued and submitted together.

Both appellants claim that Judge O'Hara, of the recorder's court, did not have the power to hear and punish for a contempt committed before him as a grand juror. That claim has been answered by the decision in the White case, this day handed down, adversely to this appellant's contention, which now controls here.

In this case, Murchison claims that false swearing before the grand jury is not a contempt of court which can be [fol. 187] punished as such; and that the record here does not factually support the finding that appellant swore falsely in the grand jury.

In the companion case, White was found guilty of contempt on the ground that he had refused to answer any questions before the grand juror unless his attorney was present, which demand was denied by the grand juror. In the instant case, as in the White Case, Murchison was cited to appear in recorder's court before Recorder's Judge O'Hara, the grand juror, to answer why he should not be punished for contempt in the grand jury proceeding. A hearing was held thereon in open court, after due notice, and testimony was taken. Murchison was found guilty of contempt, upon a finding that he had testified falsely before the grand jury, based upon testimony taken at said hearing. The court reporter who had taken the testimony of Murchison in the grand jury was sworn and testified in open court before Judge O'Hara on the hearing of Murchison for contempt. In the grand jury, Murchison, a policeman, had

been sworn and had testified regarding the location of 945 St. Josaphats court, and when asked how many times he had been there said none. He was asked whether he knew that 945 St. Josaphats court had been under observation for months by the police department as a headquarters for gambling, and answered, "I didn't know, because I am never down that way." In answer to the question how many times he had gone there in January, 1954, he answered, "None," and the same answer as to having been there in March. When asked whether he denied that he was there at any time that year, he answered, "I haven't been there." [fol. 188] He further testified that he wouldn't even know exactly where 945 St. Josaphats would be, that if they had a picture of him there it couldn't be he, and denied repeatedly that he had ever been at that place.

The testimony in the hearing for contempt was squarely to the contrary. Said place was known as a place which a so-called numbers syndicate was occupying as headquarters for conducting gambling. It was material in the grand jury proceedings to investigate whether Murchison knew of this place, was familiar with it and its use as the headquarters of a gambling syndicate; and to show any connection between the gambling syndicate and police officers. An inspector of the Detroit police department testified in the contempt proceedings that shortly after 8:40 a. m. on a certain morning in March, 1954, in company with a lieutenant of the police force, he saw Murchison at the above place. He identified Murchison, whom he had known for more than 5 years, both having been assigned to the same bureau in the police department. He further testified that a police lieutenant was there with him on said occasion and took pictures of Murchison while Murchison was on the porch of 945 St. Josaphats. The police lieutenant testified that he took moving pictures of Murchison on that occasion and at the above place; that he had been assigned to make observations of 945 St. Josaphats court, that he had known Murchison at least 10 years, and that he saw Murchison on that date at 945 St. Josaphats at about 8:40 a. m. He testified:

> [fol. 189] "A. When I first saw him, he was walking east on St. Josaphats. He came to the gate, to the en-

trance of 945 St. Josaphats, walked up on the front porch and rang the doorbell of 945 St. Josaphats. * * * He remained on the front porch for possibly 2 minutes, and then turned and went down off the porch, walked between the houses to the rear entrance of 945 St. Josaphats, where he again pushed the buzzer. He remained there for probably about a minute and a half or 2 minutes, and turned around and walked between the houses again, to the street, where he walked west on St. Josaphats towards Hastings street out of sight. * * * I took some pictures as Patrolman Murchison stood on the front porch of 945 St. Josaphats, and then after he had come from the rear of the house and started to walk west on St. Josaphats, I took some more pictures. * * *

"Q. I will show you proposed exhibit 1, witness, and ask you whether or not that is a photograph of the identical likeness of the identical structure which you observed at that time?

"A. Yes, it is.

"Q. And is the photograph of the human subject there identical with that of anyone known to you?

"A. It is.

"Q. And who?

"A. Patrolman Lee Roy Murchison. * * *

"Q. All right. Now, I am going to show you proposed exhibit 1-A, consisting of 11 photographs, and ask you the same questions with respect to them, namely, are they photographs of the physical structure at 945 St. Josaphats where you observed Lee Roy Murchison?

"A. They are.

"Q. And do you recognize the human being subject in the photograph?

"A. I do.

"Q. And who is that?

"A. Patrolman Lee Roy Murchison.

"Q. All right. And was Lee Roy Murchison in that position and at that point as observed in those photographs when you took them of him?

"A. He was."

The testimony leaves no doubt but that Murchison's testimony before the grand jury was deliberately and knowingly false. The testimony at the contempt hearing justified the finding of the recorder's court judge that Murchison had testified falsely in the grand jury.

Murchison made no claim of immunity during his testimony in the grand jury on the ground of constitutional immunity. The constitutional issue that he could not be compelled to answer without a waiver of prosecution is not [fol. 129] involved here. He testified freely in the grand jury, and obviously falsely. Under the circumstances of this case, and the procedure followed, where a witness has been proven to have deliberately, knowingly and falsely testified before the grand jury as to facts material to the investigation there in progress, may he be sentenced for contempt; or must the judge leave the matter to a prosecution for perjury?

Doubtless there are situations where such acts might be both perjury and contempt. In this case, it was proper to hold Murchison in contempt.

> "The fact that perjury is a crime for which one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject matter of a punishment for contempt; the one act constituting two offenses, one against the State and the other against the court." *In re* Slattery (syllabus), 310 Mich. 458.

See, also, the prevailing opinion by Justice Fellows in People v. Doe, 226 Mich. 5, 11.

Conviction and sentence affirmed.

> Emerson R. Boyles, John R. Dethmers, Harry F. Kelly, Edward M. Sharpe, Leland W. Carr, George E. Bushnell, Henry M. Butzel.

I concur in the result. Neil E. Reid.

[File endorsement omitted.]

[fols. 191-191a] IN THE SUPREME COURT OF MICHIGAN

46218

In the Matter of LEE ROY MURCHINSON

JUDGMENT—July 6, 1954

This matter having been brought to this Court by appeal from an order of the Recorder's Court of the City of Detroit, finding the said Lee Roy Murchinson guilty of contempt, and having been argued by counsel, and due consideration thereof having been had by the Court, and it appearing to the Court that in the making of said order in said Recorder's Court there is No Error, therefore it is ordered and adjudged that the order of said Recorder's Court of the City of Detroit appealed from, be and the same is hereby affirmed.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 191b] [File endorsement omitted]

IN THE SUPREME COURT OF MICHIGAN

[Title omitted]

Petition for Stay of Proceedings; Motion for Rehearing and Brief in Support Thereof—Filed September 1, 1954

PETITION FOR STAY OF PROCEEDINGS

Lee Roy Murchison, the above named petitioner respectfully shows as follows:

1. That on May 14 1954, he was found guilty of contempt of court and sentenced to jail by the Honorable John P. O'Hara, Judge of the Recorders Court for the City of Detroit, sitting as a one-man grand jury.

[fol. 191c-191d] 2. That thereafter upon appeal duly taken to this court, this court did, on July 6, 1954, affirm the deci-

sion of Judge O'Hara finding petitioner guilty of contempt of court.

3. That pending said appeal, petitioner has been released on bail by Judge O'Hara upon a Two Thousand Dollar ($2,000) personal bond.

4. That petitioner is informed and believes and therefore alleges upon information and belief that there are substantial questions of constitutional and statutory law which should be further considered by this court upon the application for rehearing which petitioner intends to file within the time allowed by law.

5. That pending the filing of such petition for rehearing and the termination thereof by this court, petitioner desires to be continued on bail. That a request has been made to Judge O'Hara for such continuation but Judge O'Hara has indicated that such further stay and bond should be by order of this court.

Wherefore petitioner prays that this court order all proceedings stayed pending the filing of a petition for rehearing by him and the termination thereof by this court and that this court fix such bond as it may deem just and equitable in the premises to permit petitioner to be out on bail.

Charles W. Jones, William L. Colden and George Stone, by William L. Colden, Attorneys for Petitioner.

[fol. 191e] MOTION FOR REHEARING

Now come the above named Lee Roy Murchison and John White and move the court for rehearing on its decisions affirming their convictions, and say:

1. This court erred in holding that the Recorder's Court for the City of Detroit is a constitutional court of record.

2. This court erred in holding that the act in question, sections 28.943 and 28.944, M. S. A. was an unconstitutional encroachment upon the authority of the Recorder's Court.

3. This court erred in not holding that, if such sections were unconstitutional, then Act 276 P. A. 1951, failed to express the legislative will and was therefore wholly void.

4. This court erred in holding that a respectful failure

to answer because of an honest belief that he had the right to counsel, which right could only be finally determined by this court, was an obstruction of justice and a contempt of court.

5. This court erred in holding that the defect inherent in a conviction for contempt in secret session can be cured by a subsequent hearing on an order to show cause.

For the reasons aforesaid, this court should grant a rehearing on its decisions affirming their convictions and upon such rehearing reverse their convictions.

Charles W. Jones, William L. Colden, and George Stone, by William L. Colden, Attorneys for Lee Roy Murchison and John White.

[fol. 191f] William L. Colden, one of the attorneys for the above named Lee Roy Murchison and John White hereby certifies that the foregoing motion for rehearing is made in good faith and not for the purpose of delay.

William L. Colden.

PEOPLES' MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION FOR REHEARING

In reply to the brief filed by the respondents in support of their motion for rehearing, the People say:

I

This court's opinion in the instant case completely answers respondents' contentions I and II, to the effect that the Recorder's Court for the City of Detroit is not a constitutional court of record whose powers to punish for contempt cannot be abridged by the legislature, and the M. S. A. 28.943 and M. S. A. 28.944 do not encroach upon the authority of the Recorder's Court.

We cite the pertinent language of the court to substantiate our position:

"Article VII, Section 1, Michigan Constitution of 1908 provides that the judicial power shall be vested

in the courts therein enumerated 'and such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general law,' when the legislature, by the enactment of C. L. 1948, Sec. 726.1 *et seq.* (Stat. Ann. Sec. 27.3551 *et seq.*) provided for the recorder's court of the city of Detroit, it acted in the exercise of that constitution-[fol. 191g] ally conferred power to establish 'other courts.' Having acted thus, the court so created under constitutional authority and provision, became a constitutional court of record, possessed of the inherent powers appertaining thereto, equally as in the case of the circuit and other courts enumerated in the constitution. It follows that the legislature has no power to deprive a constitutional court, such as a circuit court, of its power to punish for contempt committed in its presence. And, inasmuch as the recorder's court of the city of Detroit possesses all the powers given circuit courts in the State of Michigan, 'and to do all acts which the circuit courts of this state, within their respective jurisdictions may, in like cases, issue and do by the laws of this state,' it also follows that the legislature has no power to deprive a judge of the recorder's court of its power to punish for contempt committed in its presence. The conclusion is inevitable that when the legislature enacted CLS 1952, Sec. 767.4 (Stat. Ann. 1953 Cum. Supp. Sec. 28.944) in which it attempted to disqualify the grand juror from hearing a charge of contempt arising under CLS 1952, Sec. 767.5 (Stat. Ann. 1953 Cum. Supp. Sec. 28.945) it acted unconstitutionally and exceeded its powers in so doing." *Supreme Court Opinion, dated July 6, 1954, In re White.*

II

In paragraph III of respondent's motion for rehearing it is contended that Act 276, P. A. 1951, however construed by this court, does not express the legislative "interest" and is wholly void. We presume that respondents mean here that the act does not express the legislative "intent" and not "interest."

As stated in People's prior brief, Section 8.5 C. L. 1948 permits such severability:

> [fol. 191h] "In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say: If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not effect the remaining portions or applications of the act which can be given effect without the invalid portion or application, providing such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable."

The People also wish to point out that the alleged abuses of the grand jury, which the respondents continually harp upon, are exaggerated. Hearings of contempt in open court, such as occurred in the instant cases, have cured all of the so-called abuses, and adequately protect the rights of the respondents in contempt cases arising out of grand jury hearings.

The respondents contend that the authority of a recorder's court judge to punish for contempt has not been taken away by the act in question, but has merely been transferred to another, impartial member of the court. The power to punish for contempt, claim the respondents, does not belong to the individual officer, but belongs to the court as a whole.

This contention of respondents has been answered time and again by this court in the multitude of opinions which it handed down, and specifically in *In re Slattery*, 310 Mich. 456, at p. 467, where Justice Butzel stated:

> "So that there may be no further question, we hold that the judge conducting a one-man grand jury proceeding is acting in a judicial capacity."

[fol. 191i] Since the one-man grand juror is acting in a judicial capacity, the power to punish for contempt is a personal one and adheres to him by virtue of his office, and any transfer to another member of the tribunal is an en-

croachment upon his judicial powers to punish for contempt. In our prior brief, we quoted from *In re Debs*, 158 U. S. 594:

> "To submit the question of disobedience (of court order) to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

And we also quoted from *Watson v. Williams*, 36 Miss. 331, 341, where the court said:

> "The power to fine and imprison for contempt from the earliest history of jurisprudence, has been regarded as necessary incident and attribute of a court, without which it could no more exist than without a judge. *It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law.* A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its order, judgments or decrees against recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it." (Emphasis added.)

We believe that these citations conclusively answer respondents' contentions in this regard.

III

The respondents also claim that the intent of the legislature is the test by which the constitutionality of an act is to be determined.

[fol. 191j] If this claim were true, no act of the legislature could ever be held to be unconstitutional by a court. It is axiomatic that when a court declares a legislative act unconstitutional, it acts contrary to the wishes of the legislature. The test is not the intent of the legislature, but whether the act in question is in accord with the constitution of the state, and, it is the function of the courts to make this determination.

In the instant case, this court held that the legislature by disqualifying the grand juror from hearing his own contempts involving the refusal to answer questions en-

croached upon the powers of the judiciary. This was clearly an unconstitutional act, and properly held void by this court.

IV

As Ground IV of the motion, it is asserted John White was not in contempt of court because his refusal to answer was a respectful one and based upon his honest belief that it was right to do so under the statute.

John White's attitude in making his answers can hardly be characterized as respectful. Judge O'Hara referred to it as "Almost insolent" and "defiant." We quote from the contempt proceedings against John White, dated Friday, May 28, 1954, page 55, to substantiate our claim:

> "The Court: * * * The record of the testimony taken on Friday, May 21, 1954, shows Mr. White's attitude very clearly, as to his reasons for not answering the questions, but there is one thing the record does not show, and that was Mr. White's attitude, and I must say that his attitude was almost insolent in the manner in which he answered questions and his at- [fol. 191k] titude upon the witness stand.
>
> Mr. Colden: May it please the Court, I object to the remark, and ask it be stricken for the reason that——
>
> The Court: Just a moment. I have something else to say, Mr. Colden. Not only was the personal attitude insolent, but it was defiant, and I want to put that on the record."

The People have already answered the contention of respondents regarding the allegations in the order to show cause. As stated in the prior brief of the People, the order to show cause was intended by the judge to notify the respondents of the charge against them. It acquainted them with the fact that there was probable cause in the opinion of the judge to indicate that they had been guilty of contempt. The order to show cause was also intended to notify the respondents of the date and time when the hearing would be held in open court in order that they might prepare themselves for the proceedings. Thereafter, the hearings were held in open court, and respondents were repre-

sen'ed by counsel of their own choice; they were given very opportunity to confront and cross-exatnine witnesses; Murchison was given opportunity to present an alibi; and arguments in their behalf were presented by their attorneys. This procedure was strictly in accord with the requirements of the *Oliver* case, as propounded by Justice Black:

> "Except for a narrowly limited category of contempts, due process of law as explained in the Cook case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by coun- [fol. 1911] sel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation." In *re Oliver*, 33 U. S. 258, 275.

V

Respondents claim that the conviction was in camera and therefore unconstitutional. To make such an assertion is to ignore the proceedings which were had in the instant case. As has been pointed out in the previous paragraph and in our preceding briefs, the hearings were held in open court; the respondents were given every opportunity to confront and cross-examine witnesses; they were represented by attorneys; were given an opportunity to present an alibi; and to present all legal arguments in their behalf; reporters were admitted into the courtroom; the public was also allowed in the courtroom. All the elements of a hearing in open court were present. What other requirements for a hearing in open court would be necessary in order to satisfy the respondents is difficult to understand.

VI

The court's attention is directed to the fact that in the application for rehearing, no arguments advanced therein apply to Murchison. It is admitted that M. S. A., Sec. 28.943, in no manner precludes the judge from hearing a contempt involving perjury inasmuch as the only contempt which the grand juror was deprived from hearing was the refusal to answer questions.

[fol. 191m] CONCLUSION

The People believe that a rehearing on this matter is unnecessary. All the arguments proposed by the respondents in the present motion have been fully discussed and adjudicated by this court. Oral argument was also presented thereon. All of the points were decided against respondents by an unanimous court in an opinion filed July 6, 1954.

Since the matters urged in the petition for rehearing have been considered and determined in the said appeal, it is urged that this motion for rehearing be denied. In support of our position, we quote *Taylor* v. *Boardman*, 24 Mich. 287:

> "An application for a rehearing, based upon a showing of facts that were already upon the record, or that would not materially alter or add to the case made on the first hearing, will be denied." (Headnote.)

Respectfully submitted,

Gerald K. O'Brien, Prosecuting Attorney, County of Wayne; Samuel J. Torina, Assistant Prosecuting Attorney, 500 Police Headquarters Bldg., Detroit 26, Michigan.

Dated at Detroit, Michigan.
August 3, 1954.

[fol. 191n] BRIEF IN SUPPORT OF MOTION FOR REHEARING

I

The Recorder's Court for the City of Detroit is not a Constitutional Court

The opinion of this court holds that the Recorder's Court is a constitutional court and therefore its powers cannot be abridged by the legislature.

But Art. VII, section 1, of the Constitution vests the judicial power in certain named courts and in "such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general

law." The Recorder's Court was established by the legislature under the constitutional provision as an "other court." It therefore became not a constitutional court, as the opinion says, but a legislatively created one and subject to legislative control. The holding of this court would mean that every court created in this state would be a constitutional court.

As early as *Nichols* v. *Judge of Superior Court*, 130 Mich. 187, it has been held:

> "The legislature is, by the Constitution, authorized to establish municipal courts of criminal and civil jurisdiction. Const. Art. 6, Sec. 1. *The superior court of Grand Rapids is a creation of the legislature with such powers and jurisdiction as the legislature has seen fit to confer upon it.*" (Emphasis supplied.)

And again in *Dunham* v. *Tilma*, 191 Mich. 688, it was held:

> [fol. 191o] "This is not the case with municipal courts. They are not created by the Constitution, but are only authorized and permitted. They derive all their powers from the legislature. *Nichols* v. *Judge of Superior Court*, *supra*. And the legislature may give them large or limited powers."

In *13 C. J.* p. 47, the rule is summarized:

> "Except when the legislature is given authority to prescribe the limit of the court's power to punish for contempt, it can neither destroy nor abridge such power, *although it may regulate its use, and has the right to limit control over contempts in those courts which are of its own creation.*" (Emphasis supplied.)

In *re Fite*, 11 Ga. App. 665, it was said:

> "If the court be statutory, that is, having only legislative sanction for its existence, its power to define and punish contempts may be limited by statute."

And in *Nichols* v. *Judge of Superior Court*, 130 Mich. 187 this court said:

> "The superior court of Grand Rapids is a creation of the legislature, with such powers and jurisdiction as the legislature has seen fit to confer upon it. We must, therefore, look to the act of the legislature establishing this court to determine what power is given it over the subject of contempts."

We submit the Recorder's Court is not immune from control by the legislature.

II

[fol. 191p] Sections 28.943 and 28.944, M. S. A., do not Encroach upon the Authority of Recorder's Court

This court's opinion holds that insofar as the act prevents Judge O'Hara from passing on the contempts committed before him, it is an encroachment by the legislature upon the judiciary. The error, we think, lies in the fact that "the judge" and "the court" have, improperly been used interchangeably. A judge is by no means a court. He is only a part of a court.

> "A court is not a judge, nor a judge a court. A judge is a public officer, who, by virtue of his office, is clothed with judicial authority. A court is defined to be a place in which justice is judicially administered. It is the exercise of the judicial power, by the proper officer or officers, at a time and place appointed by law." *Todd* v. *U. S.*, 158 U. S. 275.

The legislature has nowhere taken away the authority of the Recorder's *Court* to punish for contempt. It has merely directed that another, impartial member of that court, shall hear the contempt charge or the further proceeding. The power to punish for contempt does not belong to the individual officer but belongs to the court as a whole. See *13 C. J.* p. 53, Sec. 72.

In *13 C. J.* p. 52, it is said:

> "Since contempt proceedings are substantially criminal in their nature, one court is not authorized to punish

> a contempt against another court or judge, unless such court or judge is an agency or part of the court inflicting the punishment, as for instance, where the court is composed of several divisions * * *."

[fol. 191q] In *Melton* v. *Com.*, 160 Ky. 642, it was held that where a circuit court is divided into several divisions, it was still but one court and a contempt against any one judge or division was a contempt of the whole court and could be proceeded against by any one of the divisions.

We believe that this court was in error in holding that the statute has abridged the authority of the Recorder's *Court* to punish for contempt.

III

Act 276, P. A. 1951 as Construed by the Court does not Express the Legislative Interest and is Wholly Void

This court may well take judicial notice of the public and legislative furor attending the abuses under the old one-man grand jury statute, culminating in the Oliver case in the United States Supreme Court. See *People* v. *Pichitino*, 337 Mich. 90, 94. This court must know then that it was the legislative intent to prohibit the one-man grand juror from sitting as examining magistrate or hearing contempts in those cases in which he had acted as the inquisitor. If these safeguards are to be struck down as this court has now done, the emasculated statute not only does not reflect the intent of the legislature but expressly violates it. This court must, on further consideration hold Act 276 in its entirety void. *Mulher* v. *Judge*, 111 Mich. 528.

[fol. 191r]

IV

A Respectful Refusal to Answer Based upon an Honest Belief of his Right to do so under the Statute is not a Contempt

John White did not in fact refuse to answer. He did say that he would answer if he could have his counsel present. He had been advised by his attorney that the statute gave him this right. This court had not yet ruled otherwise. We think the court is in error in holding that

this constitutes an obstruction of justice. The witness is then made to suffer for relying upon the honest opinion of his attorney on a point of statutory construction which this court has now, for the first time held to be wrong.

In *re Ziegler Co.*, 189 Fed. 259, a state court bankruptcy receiver refused to turn over property to a federal court receiver. The court held that his refusal to do, based upon his attorney's opinion that the state court's jurisdiction was paramount, would not constitute a contempt.

The refusal of White to answer other than as he did, did not constitute a contempt. His refusal, now, if this court abides by its decision, may constitute a contempt.

[fol. 191s] V

The Conviction of Appellants was in Camera and Unconstitutional

As appears from the orders to show cause both appellants had already been adjudged guilty of contempt when the hearings on the orders to show cause were had. Those orders were not orders to show cause why they should not be found guilty of contempt but to show cause why they should not be *punished* for contempt.

As approved by this court, the procedure before Judge O'Hara was just as defective as that condemned by the United States Supreme Court in the Oliver case. Here, as there, Judge O'Hara switched from grand juror to judge, and without hearing adjudged appellants guilty of contempt, and summoned them in for punishment. The fact that at this later hearing they were afforded the opportunity to put in a defense is not the answer. Judge O'Hara had already prejudged their cases.

Justice Frankfurter in his dissenting opinion in the Oliver case said (333 U. S. 257, 284):

> "It would not be fair, if the courtroom in which the accused can contest for the first time the validity of the charge against, he comes handicapped with a finding against him, which he did not have an adequate opportunity of resisting."

[fol. 191] We submit a rehearing should be granted and on such rehearing the sentences of appellants reversed.

Respectfully submitted, Charles W. Jones, William L. Colden and George Stone, by William L. Colden, Attorneys for Appellants.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 192] IN THE SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER GRANTING MOTION FOR STAY OF PROCEEDINGS—July 22, 1954

In this cause a motion is filed by the said Lee Roy Murchinson for a stay of proceedings, and nothing in opposition thereto having been filed and due consideration thereof having been had by the Court, it is ordered that the sentence of the Recorder's Court of the City of Detroit appealed from be and the same is hereby stayed pending the submission and determination of an application for rehearing, or until the further order of this Court.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 193] IN THE SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER ALLOWING AND SETTING THE AMOUNT OF BAIL—July 22, 1954

In this cause a motion is filed by defendant for the allowance of an order to let to bail pending the submission and determination of a motion for rehearing, and nothing in opposition thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, It is

ordered that the said defendant be admitted to bail pending the determination of the rehearing herein as aforesaid, and until the further order of this Court.

The conditions of this order are as follows: the defendant shall file with the Clerk of the Supreme Court a bond in the penal sum of three thousand dollars, with sufficient sureties. The defendant, after due notice given to the Prosecuting Attorney of Wayne County of the time and place when and where said bond will be presented, shall present the same to the Clerk of the Recorder's Court for approval of the bond and the sureties. Said bond shall be conditioned for defendant's appearance before and performance of any order which this Court may make in the premises, and conditioned further that this cause be submitted as speedily as possible.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 194] IN THE SUPREME COURT OF MICHIGAN

[Title omitted]

MINUTE ENTRY—September 1, 1954

In this cause a motion for rehearing is duly submitted.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 195] IN THE SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER DENYING REHEARING—September 8, 1954

A motion for rehearing having been heretofore submitted herein, It is hereby denied.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 196] In the Supreme Court of Michigan

[Title omitted]

Order Staying Proceedings—September 14, 1954

In this cause a motion is filed by the said Lee Roy Murchinson for a stay of proceedings pending his application for a writ of certiorari in the Supreme Court of the United States, and the motion having been conditionally consented to by the Attorney General, and due consideration thereof having been had by the Court, It is ordered that all proceedings in the cause be and the same are hereby stayed pending the filing of petitioner's application for a writ of certiorari in the Supreme Court of the United States, on condition that the petitioner file with the Clerk of this Court, a bond in the penal sum of three thousand dollars, with sufficient sureties, such bond to be approved by the Clerk of the Recorder's Court of the City of Detroit, after due notice to the Prosecuting Attorney of Wayne County, such bond to be filed on or before September 17, 1954, and such bond to be conditioned on petitioner's filing in the Supreme Court of the United States his application for a writ of certiorari within thirty days from and after this date.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 197] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 198-199] IN THE SUPREME COURT OF MICHIGAN

46217

Parties: In the Matter of JOHN WHITE

Plaintiffs Attorneys: Frank G. Millard, Gerald K. O'Brien, Samuel J. Torina.

Defendants Attorneys: Charles W. Jones, William L. Colden, George Stone.

Appeal from Recorder's Court of Detroit.

DOCKET ENTRIES

Date
1954

June 7. Stipulation filed.
June 8. Application for leave to appeal filed.
June 9. Application granted.
June 15. Argued and submitted.
July 6. Affirmed.
July 22. Motion for stay of proceedings filed.
July 22. Motion granted—bail $3000.
July 31. Bond filed.
Sept. 1. Motion for rehearing submitted.
Sept. 8. Motion for rehearing denied.
Sept. 14. Motion for stay of proceedings filed.
Sept. 14. Motion granted—bail $3000.
Sept. 22. Bond filed.

[fol. 200] IN THE SUPREME COURT OF MICHIGAN

[Title omitted]

APPLICATION FOR LEAVE TO APPEAL—Filed June 8, 1954

That the above named petitioner, John White, respectfully shows unto the Court as follows:

(1) That he is a resident of the City of Detroit, County of Wayne and State of Michigan, and has been such a resident for the past fifteen (15) years and upwards.

(2) That for some months prior hereto there has been pending in the Recorder's Court for the City of Detroit a so-called Grand Jury investigation under Sections 28.941 et seq. M. S. A. as amended, and that the Honorable John P. O'Hara, Judge of said Recorder's Court has been the so-called one man grand juror in charge of such proceedings.

(3) That petitioner was subpoenaed before such grand jury and required to testify before it with respect to certain matters.

(4) That thereafter on May 24, 1954, Judge O'Hara, as the one man grand juror, issued an order requiring petitioner to show cause why he should not be "punished for criminal contempt of this Court" because he refused "to answer any and all material questions put to him by this Court and the Assistant Prosecutor assigned to this judicial inquiry until and unless his attorney was present in the Courtroom during and throughout the entire interrogation of the witness" and further that he refused "to answer some material questions put to him by this Court in the course of the Judicial conduct by it without stating any reason for his refusal to answer."

[fol. 201] (5) That after a hearing on said Order to Show Cause before the Honorable Judge O'Hara on the 28th day of May, 1954, this petitioner was found guilty of contempt of Court and sentenced to be confined in the Detroit House of Correction for a period of Ninety (90) days and assessed a fine in the amount of Two Hundred Fifty ($250.00) Dollars.

(6) That petitioner has been released on bail fixed by Judge O'Hara pending the outcome of this application for leave to appeal.

(7) That petitioner believes he was wrongfully and erroneously convicted, that prejudicial error was committed by the trial court in his conviction, and that the proceedings before Judge O'Hara are unconstitutional and void, and that the reasons and grounds for his appeal are as follows:

(a) The so-called one-man grand jury statute, sections 28.941, et seq., M. S. A. constitutes an unlawful delegation of legislative and executive functions to a judicial officers

in violation of Article IV of the Constitution of 1908 of Michigan.

(b) The one-man grand jury statute deprives persons of their liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(c) The one-man grand jury statute deprives persons called before it to testify of the right to have counsel with them in violation of the Constitution of the United States Constitution of the State of Michigan.

(d) The contempt hearing before the same judge who is at the same time the complainant, indicter, and prosecutor constitutes a denial of due process of law and of the fair and impartial trial required by the Fourteenth Amendment to the Constitution of the United States.

(e) The contempt hearing before Judge O'Hara is in violation of both the letter and the spirit of the one-man grand jury statute, particularly sections 28.944 and 28.945, M. S. A., as amended by Act 276, P. A. 1951.

(f) The procedure adopted by Judge O'Hara denies to [fol. 202] petitioner the rights of a criminal trial, including the right to a trial by jury.

(g) The statute creating the so called one-man grand jury merely conferred upon the Judge conducting the inquiry the powers of an investigator and or inquisitor, and as such investigator and or inquisitor he is not acting in a judicial capacity and hence is deprived of the power inherent in the Court as a judicial officer except to those powers expressly granted by the statute hereinbefore set forth.

(h) That the right to have counsel as provided by the statute entitles the petitioner herein to the usual services rendered by an attorney and counselor, including the right to have such representation at all times during the inquiry.

(i) That the court errored in commenting on the attitude of the petitioner herein during his appearance before the Honorable John P. O'Hara in his capacity as the so called one man grand jury, and specifically the refusal after motion expunge said remarks from the records.

(8) That in support of this application there is attached

hereto a concise statement of the proceedings and facts in the Court below as far as material to this application.

Petitioner therefore prays that this court grant him leave to appeal from the judgment and sentence of Judge O'Hara finding him guilty of contempt of court and ordering him confined to the Detroit House of Correction for Ninety (90) days and assessed the fine of Two Hundred Fifty ($250.00) Dollars.

John White, Petitioner.

Loomis, Jones & Colden, Charles W. Jones, William L. Colden and George Stone, of Counsel-Attorneys for Petitioner.

[fol. 203] *Duly sworn to by John White. Jurat omitted in printing.*

[fol. 204] In the Supreme Court of Michigan

No. —

Memorandum Brief of Petitioner—June 7, 1954

I

The validity of the one-man grand jury statute must be re-examined by this Court in the light of the recent decisions such as

In re Oliver, 333 U. S. 257;

Local 170 v. Circuit Judge, 322 Mich. 332;
Dearborn Township v. Township Clear, 334 Mich. 673.

This Court must also re-weigh the applicability of In re. Richardson, 247 N. Y. 401, which it refused to follow in re. Slattery, 310 Mich. 458, but which it approved and quoted at length in the later Local 170 case, supra.

II

Sec. 28.944 specifically prohibits the investigating judge from proceeding further with the case.

> "* * * the judge conducting the inquiry under section 3 of this act shall be disqualified * * * from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment * * *"

In the present case, Judge O'Hara insisted upon himself presiding at the Trial of petitioner for contempt which of course grew out of the inquiry. He likewise insisted upon himself deciding petitioner's motion attacking the complaint or indictment (the order to show cause) against him.

III

The Judge here was investigator, prosecutor and complainant. The fact that no affidavit or complaint was filed in support of the order to show cause shows conclusively that the basis of that order lay in the mind of the judge and [fol. 205] that he had already made a decision as to the guilt of petitioner.

Petitioner was thus convicted without notice or hearing. The hearing afforded him on the order to show cause was too late, and altogether ineffectual because it was not before an impartial judge.

The hearing to meet the requirements of due process under the Fourteenth Amendment must be before a fair and impartial tribunal.

> In re Oliver, 333 U. S. 257;
>
> Tumey v. Ohio, 273 U. S. 510;
> Jordan v. Massachusetts, 225 U. S. 167;
> Adams v. United States, 317 U. S. 269;
> Cooke v. United States, 267 U. S. 257;
> In re Dingley, 182 Mich. 50.

In re Richardson, 247 N. Y. 401, holds:

> "The judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detec-

tives. * * * The outstanding fact remains that his conclusion is to be announced upon a case developed by himself. Centuries of common-law tradition warn us with echoing impressiveness that this is not a judge's work. We should be sorry to weaken that tradition by any judgment of this Court."

The procedure adopted by Judge O'Hara was in violation of accepted procedure and due process of law.

There must be an affidavit or complaint upon which the order to show cause is issued.

> Ex parte White (Tex. Sup. Ct.) 229 S. W. 2d 1002; Snyder v. State, 151 Ind. 553.

The order to show cause by itself was insufficient to confer jurisdiction upon the court to proceed.

> Ex parte White, supra.

V

There is serious question, too, whether the record supports a finding that petitioner is guilty of contempt.

There are other arguments raised in the claim of appeal upon which we are not presenting an argument in this brief, but are hereby reserving the right to file an additional brief at a later date.

Conclusion

The application of petitioner to appeal should be granted, his conviction reversed.

> [fol. 206] Respectfully submitted, Loomis, Jones & Colden by William L. Colden, Charles W. Jones and George Stone, of Counsel, Attorneys for Petitioner.

Dated: June 7, 1954.

[fol. 207] IN THE SUPREME COURT OF MICHIGAN

[Title omitted]

CONCISE STATEMENT OF FACTS AND PROCEEDINGS

On March 16, 1954, there was filed in the Recorder's Court for the City of Detroit, a petition requesting a Grand Jury investigation under Sections 28.941 et. seq., M.S.A., as amended, in miscellaneous cause number 79821 entitled as follows:

> "In the matter of the application of Gerald K. O'Brien, prosecuting attorney for the County of Wayne, for a judicial investigation into the operations of numbers syndicates and the relation of certain police officers therewith."

On March 16, 1954, the application was considered by the entire bench of Recorder's Court, the application was granted and the honorable John P. O'Hara, one of the Judges of Recorder's Court, was selected to conduct the grand jury investigation.

In the course of the investigation conducted by Judge O'Hara, Petitioner, John White, a citizen of the City of Detroit, was subpoenaed as a witness. In response to the subpoena, petitioner did appear, was sworn, but refused to testify or answer questions before the grand jury unless accompanied by his attorney during the questioning. He was advised by Judge O'Hara,

> "If there are any questions upon which you feel that you need the advice of your counsel, and it is done reasonably and not in such a way as to cause delays, you will be permitted to go out and talk to your attorney, but your attorney will not be permitted to be present in the court room."

On May 24, 1954, Judge O'Hara, acting as a one-man grand jury, issued an Order to Show Cause directed to the petitioner requiring him to show cause why he should not be

punished for "criminal contempt of this Court" because he had refused to testify without counsel being present at [fol. 208] the time such testimony was taken in order that he might have benefit of same. A copy of the order to show ca[illegible]ich includes a complete transcript of the proceedings of May 21, 1954, is attached hereto as exhibit "A". The Order to Show Cause of May 24, 1954, was returnable on May 28, 1954 at 9:30 in the forenoon, at which time the petitioner objected to any further proceedings against him on the ground that the one-man grand jury was unconstitutional and void, that Judge O'Hara, the one-man grand juror, could not constitutionally hear and determine the guilt or innocence of petitioner on the contempt hearing, and that further proceedings by him were prohibited by the grand jury statute, Sections 29.944, Section 28.945 M.S.A., as amended by Act 276 P. A. 1951, and further that the petitioner had a right to consult with counsel at all times during the hearing as provided by statute.

Judge O'Hara, the one-man grand jury, over-ruled the objections of petitioner, and forthwith proceeded with the hearing on said Order to Show Cause. There was testimony taken on behalf of the People, but objections were made by counsel for the petitioner to the proceedings for the reasons hereinbefore set forth. A complete transcript of the proceedings of May 24 and May 28th respectively is made part hereof as exhibits B and C. The contempt hearing, as conducted by the Honorable John P. O'Hara, on May 24, 1954, and May 28, 1954 were held in open Court, and any persons desiring to enter same including attorneys and members of the press were free to do so. Judge O'Hara, over-ruling the objections of petitioner's counsel, found petitioner guilty of contempt of Court, and sentenced him to be confined to the Detroit House of Correction for a period of Ninety (90) days and assessed a fine of Two Hundred Fifty ($250.00) Dollars.

At the time of sentence, Judge O'Hara also fixed bond for petitioner in the amount of Three Thousand Five Hundred ($3,500.00) Dollars with no surety pending application for leave to appeal his sentence to the Supreme

Court. Such bond has been filed and approved by the Court, and petitioner is now at liberty on bail.

[fol. 209] Prior to the time that Judge O'Hara made his determination of guilt and imposed sentence upon your petitioner, Judge O'Hara did comment on the petitioner's attitude stating specifically, "there is one thing the record does not show * — his attitude was almost insolent in the manner in which he answered questions and his attitude on the witness stand." Objection was made to this remark by counsel for the petitioner and a request that it be stricken, which request was refused by Judge O'Hara.

Judge O'Hara filed an opinion which is contained in the transcript of May 28, 1954 which has heretofore been made part of this file and referred to as exhibit C.

[fol. 210] CERTIFICATE OF TRIAL JUDGE

I, John P. O'Hara, Judge of the Recorder's Court for the City of Detroit, hereby certify that the foregoing constitutes the settled concise statement of proceedings and facts so far as they are material to the application of John White for leave to appeal and that such statement fairly presents the questions for review.

Dated at Detroit, Michigan this 7th day of June, 1954.

John P. O'Hara, Judge of the Recorder's Court for the City of Detroit.

[fol. 211] Exhibit "A" To Concise Statement Of Facts And Proceedings

State Of Michigan In The Recorder's Court For The City Of Detroit

No. 79821-3 Miscellaneous

In Re: Contempt Proceedings Against

John White

At a Session of Recorder's Court Held in the Municipal Court Building, Detroit, Michigan, on Monday, May 24, 1954.

Present: The Honorable John P. O'Hara.

Order to Show Cause

This court having heretofore convened in this cause in accordance with the statute and rules of the Recorder's Court in such cases made and provided for the purpose of conducting a judicial investigation into certain crimes, offenses and misdemeanors set forth in the order of the court, one John White having been duly summoned as a witness did appear before this court on the 21st day of May, 1954, and the said John White, having been duly sworn, was examined as more fully appears from the entire transcript of testimony given by said witness on the aforesaid day and date, in the presence of this court, which transcript duly certified, and marked exhibit A, is attached hereto and made a part hereof:

That having been duly sworn, the said John White refused to answer any and all material questions put to him by this court and the assistant prosecutor assigned to this judicial inquiry until and unless his attorney was present in the court room during and throughout the entire interrogation of the witness;

That the said witness refused to answer some material questions put to him by this court in the course of the

judicial inquiry conducted by it without stating any reason for his refusal to answer;

[fol. 242-246] That the said John White, contriving and intending to prevent the due course of justice, persisted in his refusal to answer material questions in the manner aforesaid, notwithstanding the suggestion and direction of this court that the witness may consult his counsel on any question or matter about which the witness may deem necessary;

That because of the refusal of the said witness, John White, to answer material questions put to him as aforesaid and as more fully appears in Exhibit A, hereto attached, he, the said witness, John White, has been guilty of contemptuous conduct committed during the sitting, in the presence and view of this court, all of which contemptuous conduct has an obstructive effect upon the judicial inquiry being conducted by this court, and did by his refusal to answer the material questions put to him, tend to impair the respect for the authority of this court, and constitutes criminal contempt.

It is therefore ordered that John White appear before me, a judge of the Recorder's Court, on the 28th day of May, 1954, at 9:30 o'clock in the forenoon and show cause why he should not be punished for criminal contempt of this court because of his aforesaid acts.

It is further ordered that a true copy of this order be personally served upon the said John White four days before the time herein prescribed for his appearance.

John P. O'Hara, Judge of the Recorder's Court

. . . . . .

[fol. 247] EXHIBIT "A" TO ORDER TO SHOW CAUSE

STATE OF MICHIGAN IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

No. 79821 Miscellaneous

In the Matter of the Application of GERALD K. O'BRIEN, Prosecuting Attorney for the County of Wayne, for a Judicial Investigation into the Operations of Numbers Syndicates and the Relation of Certain Police Officers Therewith

Transcript of Proceedings

Before the Honorable John P. O'Hara, Recorder's Judge, Sitting as Grand Juror, Friday, May 21, 1954

Present: Joseph G. Rashid, Esq., Assistant Prosecuting Attorney for Wayne County.

[fol. 248] JOHN J. WHITE, was sworn to tell the truth, the whole truth, and nothing but the truth, and to forever keep secret any and all proceedings, of any kind and nature connected with this inquiry, except as he may be required to divulge the same by law; and testified as follows:

Examination.

By Mr. Rashid:

Q. Your name, witness?

A. John J. White.

Q. Do you have any other names or nicknames, are you known by anything else?

A. I respectfully refuse to answer any and all questions hereafter unless my attorney is present with me here in the Court from the beginning until the end.

The Court: Your request to have your attorney here in the court room from the beginning to the end is denied, Mr. White.

If there are any questions upon which you feel that you need the advise of your counsel, and it is done reasonably and not in such a way as to cause delays, you will be permitted to go out and talk to your attorney, but your attor-

[fol. 249] ney will not be permitted to be present in the court room.

A. I still think I have that right, and I still respectfully refuse to answer any and all questions.

The Court: Well, the Court has made a ruling on that point, Mr. White, that you do not have the right.

Now, as far as this matter is concerned, it is settled.

Again, I say, that if you want to get the advice of your counsel on any question before you answer it, you will be permitted to have it, but you will be required to answer questions just the same as every other witness who has come before this Grand Jury.

Now, let us proceed.

A. I still respectfully refuse to answer any questions.

By Mr. Rashid, continuing:

Q. Where do you live?

A. (No response)

The Court: Mr. White, you have been asked where do you live. Would you answer the question?

A. I refuse to answer.

The Court: Go ahead, Mr. Rashid, give him an ample opportunity to answer.

By Mr. Rashid, continuing:

Q. How old are you? How old are you?

[fol. 250] A. (No response)

The Court: You have been asked a question, Mr. White, proceed to answer it.

A. I refuse to answer.

By Mr. Rashid, continuing:

Q. How long have you lived in Detroit?

A. (No response)

The Court: I don't want to repeat this after each question.

The Witness: My answer is the same each time.

The Court: You answer each question. We are not going to take any blanket answer from you on these questions. Each question must be answered separately.

Now, what is the last question?

By Mr. Rashid, continuing:

Q. How long have you lived in Detroit?

A. I refuse to answer unless my attorney is here with me at all times.

Q. Do you drive an automobile?

A. I refuse to answer unless my attorney is here with me at all times.

Q. What is your business?

A. I refuse to answer unless my attorney is here with me at all times.

[fol. 251] Q. Do you have an interest in or do you own the Gotham Hotel?

A. I refuse to answer unless my attorney is here with me at all times.

Q. Are you married?

A. I refuse to answer unless my attorney is here with me at all times.

Q. Do you have a family?

A. I refuse to answer unless my attorney is here with me at all times.

Q. Do you have an attorney?

A. I refuse to answer unless my attorney is here with me at all times.

Q. Who is your attorney?

A. I refuse to answer unless my attorney is here with me at all times.

Q. Do you have a father or mother or both?

A. I refuse to answer unless my attorney is here in court with me at all times.

Q. Do you have any children?

A. I refuse to answer unless my attorney is here with me at all times, from the beginning to the end.

Q. Do you own any real estate?

A. I refuse to answer unless my attorney is here with me at all times, from the beginning to end.

[fol. 252] Q. Do you now have a bank account?

A. I refuse to answer unless my attorney is here with me at all times from beginning to end.

Q. Do you know any policemen?

A. I refuse to answer unless my attorney is here with me at all times, from beginning to end.

Q. In what precinct do you live in the City of Detroit, if you know?

A. I refuse to answer unless my attorney is here with me from beginning to the end.

Q. What real estate do you own in Wayne County?

A. I refuse to answer unless my attorney is here with me from the beginning until the end.

Q. Do you have any brothers or sisters?

A. I refuse to answer unless my attorney is here with me from the beginning to the end.

Q. Are you a citizen of the United States?

A. I refuse to answer unless my attorney is here with me from the beginning to the end.

Q. Do you own your home?

A. I refuse to answer unless my attorney is here with me from the beginning to the end.

Q. Have you ever engaged in the numbers business?

A. I refuse to answer unless my attorney is here with me [fol. 253] from the beginning until the end.

Q. Have you ever given any policemen, particularly members of the Detroit Police Department——

A. (Interposing:) I refuse to answer.

Q. Just a moment. Let me finish the question, please.

A. Oh, excuse me.

Q. Have you ever given any policemen, particularly members of the Detroit Police Department any money, gift, or gratuity, or anything of value to influence their judgment or decisions?

A. I refuse to answer any and all questions unless my attorney is here in court with me, from the beginning until the end.

Q. Have you ever been arrested and convicted for any crime?

A. I refuse to answer unless my attorney is here in court with me from beginning until the end.

Q. Have you ever offered any policeman or members of

the Detroit Police Department any money or any gift or anything of value?

A. I refuse to answer unless my attorney is here with me from the beginning until the end.

Q. Have any policemen, members of the Detroit Police Department, ever asked or requested that you give them money in order to cause them to omit or delay doing their duty?

[fol. 254] A. I refuse to answer unless my attorney is here with me from the beginning to the end.

Q. Do you have a permit to carry a gun?

A. I refuse to answer unless my attorney is here with me from the beginning until the end.

Q. Did your attorney accompany you to court this morning?

A. I refuse to answer that unless my attorney is here with me from the beginning until the end.

Q. Is your attorney outside in the hall?

A. I refuse to answer unless my attorney is here with me from the beginning until the end.

Q. Did you confer with an attorney this morning before coming here?

A. I refuse to answer unless my attorney is here with me from the beginning until the end.

The Court: How are we going to know who his attorney is and whether he should be here unless he tells who his attorney is?

By Mr. Rashid, continuing:

Q. Do you wish to answer the questions now?

A. I refuse to answer.

The Court: Well, I am going to ask you a question:

Who is the attorney whose presence you desire here in [fol. 255] the court room from the beginning to the end of your questioning?

A. I refuse to answer that unless my attorney, unless I have an attorney here from the beginning until the end.

The Court: Well, who is the attorney that you want here from the beginning to the end before you will answer that question?

A. I refuse to answer that.

The Court: For what reason?

A. I refuse to answer that just.

The Court: You just positively refuse to answer?

A. Correct.

The Court: And you give no reason for refusing to answer?

A. Correct.

(Brief pause.)

By Mr. Rashid, continuing:

Q. Now, witness, I have asked you a series of questions and the answers to the questions were not given by you, and you refused to answer because you demanded that your attorney be with you from the beginning to the end.

Now, witness, do you have any other reason for refusing to answer the questions that have already been put to [fol. 256] you?

A. I refuse to answer that question unless I have my attorney here in the court room with me from the beginning until the end.

Q. Is that the only reason you refuse to answer these questions at this time?

A. (No response)

The Court: Answer that.

A. I refuse to answer.

The Court: I am going to give you another opportunity, Mr. White, to comply with the order of the Court. So I am going to ask you a general question:

Your reason for refusing to answer these questions has been overruled by the Court and you have been ordered to answer the questions, but you still persist in your refusal.

Now, I am going to ask you, finally:

Do you still refuse to answer these questions for the reasons that you have given?

A. I do.

The Court: And you still refuse to answer some of those specific questions just for the reason that you refuse to do it?

A. All questions I refuse to answer.

[fol. 257] The Court: Well, I think the record is very clear here that this witness is in contempt of court, and that is that he is subject to the penalties which are provided by law, and I am going to make a study of this record and then decide upon what action I shall take.

So I would suggest that, Mr. White,—I would suggest that Mr. White be given another subpoena to return some time next week, and then the Court will be in position to proceed further on this matter.

So, unless you have some other questions, Mr. Rashid, Mr. White will be excused now but he will be given another subpoena requiring him to return.

Mr. Rashid: Very well, your Honor.

The Court: All right. You are excused.

The Witness: Thank you, sir. I will get the subpoena here or where?

The Court: Yes, we will give you a subpoena.

The Witness: Thank you, thank you.

(Brief pause.)

The Witness: May I be excused now?

Mr. Rashid: Just a moment, Mr. White. What time did you set that for, Monday?

Officer Mullins: 9:30.

Mr. Rashid: He can go, thanks.

[fol. 258] The Witness: Thank you.

(Witness excused.)

[fol. 259] Stenographer's Certificate to foregoing transcript omitted in printing.

[fol. 260] EXHIBIT "C" TO CONCISE STATEMENT OF FACTS AND PROCEEDINGS

STATE OF MICHIGAN, IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

No. 79821-3 Miscellaneous

In Re: Contempt Proceedings Against John White

Transcript of Proceedings

Proceedings had and testimony taken in the above-entitled matter before the Honorable John P. O'Hara, Judge of the Recorder's Court, at Detroit, Michigan, on Friday, May 28, 1954.

APPEARANCES

John W. Gilmore, Assistant Prosecuting Attorney, and Samuel J. Torina, Assistant Prosecuting Attorney, Appearing as attorneys on behalf of the People.

Charles W. Jones, and William L. Colden, Appearing as attorneys on behalf of Respondent.

[fol. 261] Detroit, Michigan, Friday, May 28, 1954, 10:05 o'clock A. M.

(Thereupon Court was opened by the Court in open court.)

The Court: This morning we have before us the Order to Show Cause to John White, why he should not be adjudged guilty of contempt of court.

Now, the record should show that this is a proceeding of the Recorder's Court for the City of Detroit, and that the court is open. The doors of the court room are open, and anybody who desires to come into the court room is privileged to do so.

The record should show that Mr. White is represented by his counsel, Mr. Charles Jones and Mr. William L. Colden.

Now, this being an Order to Show Cause, it would, in the ordinary course of proceedings, be incumbent upon the respondent here, John White, to show cause why he

shouldn't be adjudged guilty of contempt. I believe we can simplify the proceedings a little by a stipulation, which will take care of whatever testimony would be required [fol. 262] here this morning. Attached to the Order to Show Cause is a complete transcript of the testimony of Mr. White—I might say a lack of testimony of Mr. White—upon which the order to show cause is based. And I would suggest, if it is agreeable to counsel, that a stipulation be made, admitting the transcript of testimony of Mr. White taken on Friday, May 21, 1954, into evidence.

What would you say about that, Mr. Jones?

Mr. Colden: I don't believe we would have any objection to the transcript of testimony being admitted into evidence. It is exactly the proceedings that occurred on Friday. With the exception, however, that we are not in agreement with that phrase, "lack of testimony". To me the transcript is quite full and complete with testimony, and the testimony is contained in one sentence. I believe that in view of the—I think brevity is the soul of wit—that if one sentence can contain all of the testimony of all of the ideas that the so-called witness intends to convey to the Court, it has quite adequately supplied the need of testimony.

Mr. Gilmore: Are we to understand, then, Mr. Colden, that you do stipulate that the testimony as attached to the Order to Show Cause which was served upon the client is a true, accurate and correct copy of the proceedings that [fol. 263] took place on May 21, 1954, with respect to your client, Mr. White?

Mr. Colden: I would have to concede that, in view of what I have just said a moment ago.

Mr. Gilmore: Let the record indicate, then, that it is so stipulated.

The Court: In addition to that, I would like to have a copy of that testimony marked as an exhibit, and have it introduced as an exhibit.

(Whereupon a copy of the transcript taken on May 21, 1954, was marked Exhibit 1 for identification by the reporter.)

Mr. Gilmore: Let the record indicate that I am handing to counsel a copy of the exhibit for his examination, being Exhibit 1.

Mr. Jones: I will agree that this is a correct copy.

OFFER IN EVIDENCE

Mr. Gilmore: May it please the Court, I offer Exhibit 1 in evidence.

The Court: Exhibit 1 will be admitted in evidence, and that exhibit contains the questions and the answers which were put to and given by Mr. White on Friday, May 21, 1954, in this court room.

Mr. Gilmore: It does, your Honor, and it is certified by [fol. 264] the stenographer.

The Court: Very well.

Well, that having been placed in evidence would complete the record as far as the identify of the testimony given is concerned. Have you anything else to add, Mr. Gilmore?

Mr. Gilmore: That is all at the moment, your Honor.

The Court: I think now, Mr. Jones, and Mr. Colden, that we have arrived at the point where you show cause why Mr. White should not be adjudged guilty of contempt.

Mr. Jones: Well, your Honor, at this time, to make the record more complete as far as appearance in this case, I think on Monday I stated that Mr. Colden and I were law partners, that he had filed an appearance in this case, and I think it was conceded by Mr. Rashid that he had done so. But for the purpose of the record, I want the record to show that this appearance was filed May 14, 1954, wherein Mr. Colden filed:

(Reading.)

> "Please enter my appearance as attorney for John White, defendant, in the above entitled cause."

and this was signed by Mr. Colden.

[fol. 265] And it also marked "filed", dated May 14, 1954, and signed by Eddie Reiha as deputy clerk of this Court.

Mr. Gilmore: If the Court please, this appearance is a part of the official records of the Court, and, as such, I

have no objection to it, except that portion of the appearance which states: .

(Reading.)

"My appearance as attorney for John White, defendant in the above-entitled cause."

At the time that this appearance was filed, John White was not a defendant.

Mr. Jones: I might say——

Mr. Gilmore: (Interposing.) I call that to the Court's attention at this time.

Mr. Jones: In reply to that, I might say, your Honor, this is the official precipe for appearance that is handed attorneys when they come to this proceedings.

The Court: Well, that word "defendant" should be "witness".

Mr. Jones: Should be what?

The Court: "Witness".

Mr. Jones: I will ask an order non protune be entered [fol. 266] and that it be determined "witness" rather than "defendant."

The Court: Very well.

Mr. Gilmore: We consent to the amendment.

Mr. Jones: May I proceed, your Honor?

The Court: Yes.

Motions that the Order to Show Cause be Dismissed and That This Matter Be Transferred to Some Other Judge

Mr. Jones: Proceeding further, I make a motion that the Order to Show Cause be dismissed in this case because it is based upon the signature of the Judge, and not based upon an affidavit of a public official like the Prosecutor or Assistant Attorney General. It is only signed by the Judge. It doesn't bear the affidavit, which it is our contention should be made by either a Prosecutor or Assistant Attorney General or someone, some attorney who is assigned to the Court.

It is signed by the Judge. The Judge brings in the Order to Show Cause. It is our contention that that is

illegal. It is not a proper order issued by the Court. It is an order issued by the Court, based upon something that happened heretofore, and I submit that the Assistant Prosecutor was here. He heard the testimony. And it should be based upon that. That is one of the reasons.

The second motion is a motion that this matter be transferred to some other judge because this Court has no [fol. 267] jurisdiction to hear this contempt proceedings. It is our contention that it has been said here before that, well, the Court has an inherent jurisdiction to hear contempt. I concede that the Court has an inherent jurisdiction to hear contempt proceedings, and the fact that this statute was enacted in 1951 doesn't take away that authority.

The statute only says it should be transferred to some other judge to hear this type of contempt.

In other words, it doesn't take away the inherent right of a judge to cite a person for contempt of court, because I think it has been decided by our Supreme Court before this Act was enacted. They said this, that in certain contempt proceedings, it is better practice, although they said the judge was all right in citing a person for contempt of court and hearing a matter, but in a case in our Supreme Court, it was decided that the better practice would be that the judge assign it to some other judge to hear the matter.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: What is that case, Mr. Jones?

Mr. Jones: I think it is 182. It is a Michigan case. I think it is 182 Michigan, as I remember, your Honor.

The Court: The case you are referring to, I believe I am familiar with. In that case the contempt did not occur [fol. 268] in the court room at all. It was something that occurred outside the court room, and at which the judge had no personal knowledge.

Mr. Jones: I don't think it would make any difference, your Honor. You see, had your Honor cited this man for contempt right away, without an order to show cause, for something he actually did physically in the court room to obstruct justice, why, I think it would be all right, see.

But this is an order to show cause just like that particu-

lar case was an order to show cause, and the Supreme Court said—that is before this statute was amended in 1951—the Supreme Court said even in that case that the better practice would be that the judge not hear the contempt proceedings.

The Court: I wish you would get me that case, because if you cite cases for authority and expect the Court to consider them, I think you ought to be able to tell the Court——

Mr. Jones (Interposing): I will get it as soon as I finish. Now I don't want to break my trend of thought.

There is another case which says that—I think that case is People vs. Martin. I will have to look that one up. That was where a judge conducted an examination. He later [fol. 269] called the trial. It was appealed to the Supreme Court. The Supreme Court affirmed the conviction, but they gave a very nice opinion in that case, saying that the better practice is that the judge should not try a case where he has conducted a preliminary hearing or an examination.

The Court: What is the citation?

Mr. Jones: People vs. Martin. I will get that case for you.

The Court: What book is it?

Mr. Jones: I don't know offhand the volume, but universally this Court, Recorder's Court, ever since I have been practicing law, and since that decision come down, universally, this Court, recorder's Court—and I am very familiar with the procedure here—the presiding judge who is familiar with the procedure, never sends a case to the judge who conducted the examination. I remember just a few days ago Judge Ricca——

The Court: Well, you are talking about a different matter now.

Mr. Jones: I am talking about the procedure. This is a procedural matter. And in that case the Supreme Court said it wasn't error, but the better practice would be that it would be sent to some other judge for trial rather than [fol. 270] the judge who conducted the preliminary examination.

The Court: Are you talking about a preliminary examination now, or are you talking about a contempt matter?

Mr. Jones: I am merely citing this as a policy of the Supreme Court, what they have said in all matters.

The Court: I think what you are talking about now, about examinations, has no bearing on this matter, but because I think one of the Recorder's Court rules is that the judge who hears the examination may not try a case, may not sit when the case is tried.

But that is something different.

What you are talking about here is a contempt matter.

Mr. Jones: I don't think it is different. I think it is argument in favor of the thing that I am trying to argue to your Honor.

The Court: I wish you would get me the cases that you are talking about. That would be more convincing than your statement of your recollection of what the procedure is.

After all, the question is what is the law of the State as laid down by the Supreme Court

[fol. 271] Mr. Jones: The Supreme Court has never passed on this, so all we have got to present is the logical argument.

I think when we go to the Supreme Court that is all we have got to present is logical argument.

The Court: What I am trying to get, Mr. Jones, are the authorities which you cited in Michigan.

Mr. Jones: Well, I will get 'em for you. I didn't think his Honor would call for them. I could get them.

I have had occasion to read them many times, and am familiar with the theories on which I presented this argument.

As I said, this is on the argument, because after all, this statute was amended in 1951, and there has been no decision on it, so the only thing we present is logical argument.

The Court: I have here a case, 182 Michigan, 44, in re Dingley.

Mr. Jones: That's the case.

The Court: Well, I thought that was the case you were talking about, but that involved an article that was printed in a newspaper about a judge.

Mr. Jones: It was contempt, nevertheless.

[fol. 272] The Court: Let me finish, Mr. Jones.

You will see what I am trying to say illustrates the

difference between the matter that we have here and what the Court had in the matter in re Dingley.

There it was the judge himself who was personally attacked. Now, in order to bring that matter before the Court, the newspaper and its content, and particularly what was said about the judge, in question, had to be presented to the Court by way of affidavits. There are two distinct types of contempts.

One is a contempt that is committed outside the court room, where the judge has no knowledge of it at all except as it is proven through affidavits or testimony. The other is a contempt which is committed in the presence of the Court.

And what the Supreme Court was talking about in the matter of in re Dingley, where it said that where a case of that kind might better be heard by another judge, is not the type of case that we have here. In fact, the syllabi, Section 4 of the Syllabi, says:

(Reading.)

> "While the judge who was criticized was not thereby disqualified from sitting in the contempt proceeding, the better practice is to call in another judge."

[fol. 273] Mr. Jones: That is right.

The Court: That is a different matter entirely.

Mr. Jones: Don't you agree with that, Judge?

The Court: What?

Mr. Jones: Don't you agree with that?

The Court: What I am trying to explain to you, Mr. Jones, is that that case is not similar in any respect to what we have before us, and whether I agree with it or not—of course I do. It is what the Supreme Court said. But that involves a different kind of case.

Mr. Jones: It involves contempt.

The Court: Yes, but——

Mr. Jones (Interposing): You signed the order to show cause in this case.

The Court: Let's not argue that. It is conceded. I signed it because the contempt occurred directly in my presence. In fact, I could touch the man with my hand, if I wanted

to, when he was giving the testimony which is the subject of contempt.

Now, that is vastly different from what you are talking about.

[fol. 274] Mr. Jones: Well, no.

In his theory, he was basing it upon the reason he testified in the manner in which he did was because of the fact he was relying on the statute that was enacted that a witness is entitled to counsel at all times. That was the reason why.

The Court: Well, you cited another case, Mr. Jones. Let's look at that. What is that?

Mr. Jones: People vs. Martin. That's an examination case.

The Court: Well, let's get the case.

Mr. Jones: I don't have it with me.

The Court: How am I going to pass upon whether your argument has any merit or not when you can't give me the citation to the authority?

Mr. Jones: I can give you the citation. I don't have it this morning. I didn't expect your Honor to ask me for a citation.

The Court: Didn't you know we were going to hear this matter this morning?

Mr. Jones: That is true. I assumed his Honor knew the case.

The Court: You argued about the contents of that case to me, and naturally——

[fol. 275] Mr. Jones (Interposing): I don't have it with me now, but I will find it. There is such a case, isn't there?

Mr. Torina: Yes, but it is a different type of thing than this. An examination and a contempt have no relation.

The Court. Here, here, let's not get into a discussion.

What other point then do you have plus one and two?

Mr. Jones: I know it isn't, but it is only an argument, you see, on my theory.

The Court: Instead of arguing about what is in it, let's get the case itself. Instead of practicing law by ear, let's do it by books.

Now, you made two points, Mr. Jones. Have you any other objections, too, or have you any other points in support of your motion to dismiss?

Mr. Jones: May Mr. Colden proceed at this time?

The Court: Yes.

But what I wanted to know, so that I will understand what is being done, are those two points that you just stated the two points upon which you base the motion to [fol. 276] dismiss?

Mr. Colden: No, your Honor. I will amplify those two points.

The Court: I thought, Mr. Colden, you might be taking up another point.

Mr. Gilmore: May I ask, if the court please, before Mr. Colden begins, are those distinct motions, one to dismiss and one to transfer to some other judge?

Mr. Jones: Yes.

Mr. Gilmore: Those are two separate and distinct motions?

Mr. Jones: Yes.

Mr. Colden: Now, in arguing the motion to dismiss and leaving alone for the moment the motion to transfer, I should like to call to the Court's attention that the Court is absolutely without authority, in line with what Mr. Jones has said, to conduct this examination, because the very statute giving your Honor the power to sit as a One Man Jury or inquisitor, if you prefer, specifically forbids——

The Court: Let me interrupt you.

I don't prefer the term "inquisitor", because the Supreme Court has said repeatedly that a judge is sitting as a judge and in a judicial capacity, and not as an inquisitor. [fol. 277] Mr. Colden: I don't mean to offend the Court in any way.

The Court: You are not offending me: I just want to straighten out the record.

Mr. Colden: I have seen that word used frequently in various opinions, so I used it, letting your Honor pick up which one you would prefer.

The Court: Well, if there is any doubt about it, let the statement of the Court stand as the Court's idea of what the function of the Court is and the position of the Court is.

Mr. Colden: Very well.

Now, the section, reading from the Code of Criminal Procedure, Michigan Statutes Annotated, Section 28.944—that

is the section that has to do with the power of the judge to hear contempts or what he may do with witnesses under certain circumstances. It reads specifically that the power of the judge "from acting as the examining magistrate in connection with a hearing on the complaint or indictment, from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaints or indictment or from hearing any charge of contempt under Section 5, except alleged contempt or neglect or refusal to [fol. 278] appear in response to a summons or subpoena."

Mr. White did appear, so we cannot bring him within that exception. Section 5, which is the following section, Michigan Statutes Annotated, Section 28.945, says specifically:

(Reading.)

> "Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such judge may require as material to such inquiry, shall be deemed guilty of a contempt and after a public hearing in open court and conviction of such contempt, shall be punished by a fine——"

And it goes on with the punishment.

Well, it would appear to me since the man did appear in response to the subpoena, but he merely refused, based upon his reasoning as a layman, and that was for the specific reason that he wanted his counsel present at all times, you fall squarely within Section 5.

Now, there are no cases on this, but we do know as a matter of fact, and as a matter of public knowledge, why this Act was amended. To prevent the abuses of the abuses [fol. 279] of the previous Grand Jury, and specifically, the Grand Jury's conducted by our distinguished Senator. Those items were hashed over by the Legislature in committee meetings, and they said, "What are the best safeguards that we can possibly give to a witness appearing before a Grand Jury, since we are going to have the anomaly of a One Man Grand Jury?"

I used the word "anomaly" because Mr. Justice Rutledge, in his opinion, although he concurred in the ruling, he gave a separate opinion, and he doesn't think too highly—and I respect his distinguished judgment—of our One Man Grand

Jury system, simply because it is a departure from the 14th Amendment in our so-called Bill of Rights.

Now, I say there are no cases in Michigan in point here. I believe the first judge, and I want to make this a part of the record, who prohibited an attorney from coming in to remain with his client at all times was Judge O'Hara in Circuit Court. I am not too certain of that from the factual standpoint. And that practice has been continued, is now being continued by your Honor.

I say our Supreme Court has never decided it. I say we can go to all the cases in the books, and because of the anomalous situation we have in the Michigan One Man [fol. 280] Grand Jury, we find nothing at all to aid us. The only thing we can do in certain instances in which we have brand new facets of the law is to appeal to the Supreme Court with the logical argument and reasoning by analogy, as it were, in order that they in their distinguished minds might arrive at a conclusion that will be just and fair in light of the conditions which the Legislature were trying to correct.

Along with that, I should like to add all of the reasons that we have advanced in the previous cases before your Honor, and that is—I will say this in an aside—in my opinion, this matter takes in both phases or theories of the two things we are trying to determine and test in this Act, as to whether or not your Honor has the right to conduct a contempt proceeding after citation, and whether or not a witness has the right to have counsel in the court room at all times.

And like the previous cases in which we argued before your Honor, we did not have those two sections, but I believe, and I am trying to make certain, that we are going into this record everything that will put everything in this particular one that our Supreme Court might pass on the validity of the Act in toto.

The so-called One Man Grand Jury statute, Sections [fol. 281] 29.941, and so forth, constitutes an unlawful delegation of legislative and executive functions to a judicial officer in violation of Article 4 of the constitution of 1908 of Michigan.

The One Man Grand Jury deprives persons of their lib

erty without due process of law in violation of the 14th Amendment to the Constitution of the United States.

The One Man Grand Jury deprives persons who are called before it to testify of their right to have counsel with them at all times, in violation of the Constitution of the United States and the Constitution of the State of Michigan.

Now, let me digress at that point just for a moment. We realize very keenly that your right to sit as a One Man Grand Juror is derived from statute. It is not the common law system. I should like to read to the Court, but I am quite certain the Court is familiar with Mr. Justice Rutledge's reasoning in his concurrent but separate opinion in the Oliver case.

The Court: I think that Mr. Justice Rutledge wrote an opinion, and no other of the eight members of the Court agreed with him.

Mr. Colden: Well, that is quite true, your Honor, but we still must have to admit that Mr. Justice Rutledge has an [fol. 282] able mind, is a very able man. There was another able man, Mr. Justice Holmes, who used to dissent quite frequently, but he had quite an able mind, too.

The Court: Well, Mr. Colden, I have read that case you are referring to, the Oliver case. I read it many times.

Mr. Colden: So did I.

The Court: I have one volume at home. I have one volume here. And I have read it many times with various phases of the opinion, or various questions suggested themselves to me.

But I don't think you could very successfully argue that the Court should follow anything that one judge said in an opinion where no other judge agreed with him.

Mr. Colden: Well, yes, I think I would have to agree with the Court.

The Court: Oh, you can argue it if you wish, but I mean, the weight of it isn't very great.

Mr. Colden: I don't know. Oftimes I have seen the weight of good sound reasoning on the part of a dissenting judge. I think we had one in the State called Cooley. Perhaps after twenty or thirty years we would finally get around to his way of reasoning. Sometimes, you know, you must have someone in the forefront of things.

[fol. 283] The Court: With respect to Judge Cooley, I think if you will look at his decisions, he wasn't a dissenting judge.

Usually the other judges agreed with him, because Judge Cooley was looked upon as one of the outstanding jurists of the age.

Mr. Colden: But getting back to the argument, your Honor does derive his authority strictly from the statute. I would say within the four corners of this Act, all the power that your Honor might have would be contained therein. Your Honor has said that you have the inherent power to cite for contempt occuring within your presence, because you are a court of record, and that power cannot be taken away from you by the legislature. And that we wholly agree, except the legislature tells you how to do it.

And here they say you can't do it.

Now, the very statute that gave you your powers says to you, "But you must exercise this power a certain way."

Now, they didn't say you must exercise it in view of a constitutional right of a judge, or even a common law right of a judge, the inherent power to cite for contempt, and it is not taking away your power to punish for contempt. It is merely giving you a directive, telling you which road to [fol. 284] go down, as it were. And I assume if they have the right to ingrant upon our Anglo-Saxon procedure an anomaly such as the Grand Jury, then they have the right to tell you how you can proceed with contempt.

The contempt hearing before the same judge—this is another reason—who is at the same time the complainant, indicter and prosecutor, constitutes a denial of due process of law and of the fair and impartial trial required by the 14th Amendment to the Constitution of the United States.

The contempt hearing before Judge O'Hara is in violation of both the letter and the spirit of the One Man Grand Jury statute, particularly sections 28.944 and 28.945, M.S.A., as amended by Act 276, and, of course, the procedure adopted by Judge O'Hara denies to the petitioner the right of a criminal trial, including the right of trial by jury.

Now, as I said before, I am addressing myself specifically at the moment to Mr. White's right to have counsel. The Legislature gave him that right. What does a right to counsel mean?

We are very, very much at a loss to find cases on that, because they aren't made. So we again have to go to an argument which the Supreme Court will have to finally [fol. 285] resolve. And what does that mean? I can't in good conscience have a man come to the door to me and say, "Shall I answer one question," or "How should I do it, what should I say, keep quiet," when I don't know what has gone on before. You can't take one thread out of whole cloth and tell what the pattern is. Your advice might be entirely illogical and in error, so far as your duty to the bar is concerned, and to the Court.

In Powell vs. Alabama, 287 United States 451, it specifically said:

(Reading.)

> "A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of over zealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

Citing Williams vs. Kaiser.

Now, let's compare your functions as a One Man Grand Juror to the functions of a 21 Man Grand Jury, in which witnesses are brought in, and evidence laid before them and they decide whether or not a true bill, as it is called in some cases, might lie, or whether it won't. Here it gives it into the hands of one man, notwithstanding the opening of the [fol. 286] doors, notwithstanding the so-called public trial, it gives in the hands of one man all of that power and right that stemmed from those age-old instances that happened in the Spainish inquisition, and in England, before King John.

Not that your Honor would do them at all, but you do have the power. That was what we were trying to get away from.

To get back to our concept of that, if it were not for our so-called State's rights, the idea of the conduct of justice, I respectfully submit that the Legislature pointed out the way, but did not condone the power of contempt.

In view of that situation, I think the order to show cause should be dismissed.

The Court: Have you anything further to say, Mr. Jones?

Mr. Jones: No, your Honor.

Mr. Gilmore: If the Court please, I believe the terms of the statute, as construed by this Court, are self explanatory, and provide their own complete, full answer to the argument presented on the motion by Mr. Colden and Mr. Jones.

The Court: Well, Mr. Colden and Mr. Jones have pre- [fol. 287] sented two main arguments this morning. One pertains to the right of this Court to sit in a contempt matter where the contempt arose before the Court as Grand Juror, and the other involves the right, or privilege, which an attorney is given under the provisions of Section 28.943, of Michigan Statutes Annotated.

The first question, the right of this Court to deal with contempts, was also raised in the matter of Lee Roy Murchison, and I understand Mr. Jones and Mr. Colden, that you are representing Lee Roy Murchison in an appeal to the Supreme Court which is now being prepared?

Mr. Jones: That is right, your Honor.

The Court: In that matter, I wrote an opinion. I went into the matter quite thoroughly. I believe the opinion is over twenty pages long, and I don't think, since it is expected that all of these matters will be before the Supreme Court, at one time, that it is necessary to repeat the opinion in the Murchison matter. For the purpose of the record, so there will be no question about my decision on it, I am going to incorporate that opinion by reference to this particular matter.

Upon appeal of these matters, one copy of the opinion will be sufficient, but just so there will be no question about what I held in the matter, I will so incorporate that opinion in [fol. 288] this matter. I don't think it is necessary to take up the time now repeating what was said there. The opinion holds that the Recorder's Court for the City of Detroit possesses the same inherent power to hear contempts that the Circuit Court, which is beyond question a constitutional court, has.

The provisions of Section 28.943 of the Michigan Statutes Annotated, restrict the courts which may hear petitions in the so-called One Man Grand Jury law to any judge of the Court of law and of record.

Now, the only courts of record in the State of Michigan are the Circuit Courts, the Superior Court of Grand Rapids, and the Recorder's Court of Detroit.

It may be that the Common Pleas Court is a court of record, although many lawyers who have studied that question, which I have not, claim that there are serious doubts as to whether it is a court of record, but at any rate, there is no question but what the Circuit Courts of the State, and the Superior Court of Grand Rapids and the Detroit Recorder's Court are courts of record.

All of those courts have what is known as an inherent power of a constitutional court to punish for contempt. The Circuit Courts get it through the Constitution and the [fol. 289] Grand Rapids and the Detroit courts get that power through the Acts which created them.

In the opinion I stated that it was clearly unconstitutional for the Legislature to try to deprive a constitutional court of record of its inherent right to hear contempts. I don't think that anybody will argue that that conclusion is unsound, because from time immemorial, constitutional courts have had that power regardless of which the legislatures said. In many instances legislatures have tried to take that power away and in some instances legislatures have tried to restrict it, but whenever the question was taken up to a higher court, or a court of last resort, it was held that a constitutional court has that inherent power and the legislature cannot take it away.

If this court is deprived of that power, the Circuit Courts are deprived of that power. The provision under which that power is allegedly taken away, makes no distinction between the Recorder's Court and the Circuit Courts. All courts of record are affected by it.

Now, in the Murchison opinion, there are, I think, two Michigan decisions cited to the effect that a provision which is void cannot be separated so as to cover a part of the objectives it was supposed to embrace. Whenever that [fol. 290] situation arises, the statutes are void in entirety. In order to hold that this court is affected by it, even though the circuit courts are not, it would be necessary to limit that provision to two courts, the recorder's court of the City of Detroit, and the Superior Court of Grand Rapids.

Under the decisions involving statutory construction no court is at liberty to put that interpretation upon a provision such as we have before us.

If the Legislature had been told that it could not take the power to punish for contempts away from circuit courts, but it might restrict the Recorder's Court and Superior Court of Grand Rapids, I don't think the Legislature would have said, "Well, we will amend that law anyway and say that at least the Recorder's Court and Superior Court of Grand Rapids shall not have the power to punish for contempt."

I think this provision is void, is void in its entirety.

Now, there is another reason, too, why I thought the provision was void. The Recorder's Court of the City of Detroit, as it is now constituted, was created by the Legislature under a constitutional provision which required a [fol. 291] vote of two-thirds of both houses-elect, to create a court such as this. And, in addition to that, it required a referendum of the People in the territory affected.

Under the decisions of the Supreme Court of the State of Michigan, it has been very clear for many years that where a legislative body must have a certain percentage of the body or certain numbers of the legislative body to enact a law, the legislature cannot amend or repeal that law unless it is done by the same percentage of members that was required for its enactment.

Now, in this case, this Court was created by at least a two-thirds vote of both houses elect. By that, as I read the law, it means that in 1951 at a time when the legislature was composed to one hundred members of the house, it would require 67 members of the house voting in favor of the law to create a court of this kind, and it would require 22 members of the senate, because those figures would comprise two-thirds of both houses elect.

If the powers of the judges of the Recorder's Court are to be shorn from them, then in my judgment it could be done only by an act which would comply with the constitutional provision, and an act which was passed by two-thirds of each house elect.

[fol. 292] On that point, I have a couple records here I am going to ask you to introduce into evidence, Mr. Gilmore, before we get through.

Mr. Gilmore: Very well, your Honor.

The Court: I believe on both of those grounds, that the attempt of the legislature to deprive this court of its power to punish for contempt was unconstitutional, and for that reason, void.

I had hoped you gentlemen who had a copy of my opinion, might have had some argument to the contrary this morning or some law to the contrary, because I am interested in seeing what might be found on the other side of the picture.

Mr. Jones: May I interrupt at this time and make a little comment on that phase of it, your Honor?

The Court: Yes.

Mr. Jones: My comment would be that assuming for the purpose of argument that your theory or your opinion or your judgment is true, wouldn't it also be true that the entire Act as enacted by the legislature, I mean as amended, the entire act as amended, by the 1951 Legislature, would be unconstitutional?

The Court: I don't think so.

[fol. 293] Mr. Jones: And it would rever to the Act, the previous act. That is—I mean, that is my considered judgment on it as I say, assuming for the purpose of argument that your theory or your opinion is true.

The Court: What you are saying is that if one provision of the Act is void, the entire Act would be void, or all of it, all of the amendments made would be void?

Mr. Jones: On the theory that you just got through announcing.

The Court: I don't agree with you because what I am talking about is a specific power which is one of the most sacred powers courts possess. I am talking about that, not about the right of the legislature to provide for Grand Juries. Beyond question, the legislature has that power.

So, I get your point, but I don't think that the entire Act, all the amendments made in 1951, would be void.

The entire Act wasn't passed in 1951. Amendments were made to certain provisions of the Act then in existence.

Well, now, continuing.

The next point that you raised is this question of the right of an attorney to be present in the court room.

[fol. 294] To go to the basis of that argument, it is well

to look at the provision of the law itself. In Section 28.943, of the Michigan Statutes Annotated, this provision is found:

(Reading.)

> "Any person called before the Grand Jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt."

That is the provision upon which you gentlemen base your argument that a witness called before the Grand Jury is entitled to have his counsel sitting in the court room listening to the proceedings before the Grand Jury.

Am I right about that?

Mr. Jones: That is right, your Honor.

Mr. Colden: Later on, down in that section is the function of a lawyer when he comes in as to his secrecy, too.

I would like that read into the record, the function of a lawyer when he has conferred with his client as to secrecy. [fol. 295] Mr. Torina: The one where the attorney has taken the oath to secrecy.

Mr. Colden: A couple sections down.

The Court: Well, I confine myself to this part right now.

This first section does not contain any statement to the effect that a witness called before the Grand Jury is entitled to have his lawyer in the court room. It says:

(Reading.)

> "Any person called before the Grand Jury shall be entitled to legal counsel."

Now, "legal counsel" as I read it there, means advice.

And that provision, as far as I read, means that a man who was called before the Grand Jury, one man grand jury, as a witness, is entitled to legal advice.

Now, going further, it says: "not involving delay."

If that meant he was entitled to have a lawyer in the court room, I don't know why the words "not involving delay" were placed in the sentence, because if he was entitled to legal advice not involving delay, it would mean that when

he reached the point where he felt that he wanted legal advice, he could go and get it, but he couldn't unduly delay [fol. 296] the Grand Jury proceedings. To me that would mean that if he had a lawyer, he could go out and talk with his lawyer and get legal counsel. To me it seems that if the legislature intended that a lawyer was to sit in the court room, it could have said so very easily.

It didn't say so, and because it didn't say so, and because of something else I am going to refer to in a minute, I am convinced that all the legislature intended to do was to allow a witness to consult with a lawyer and get legal advice as to what he should do.

Going further with that same provision, I want to make another comment. To do that I will have to start at the beginning again.

(Reading.)

> "Any person called before the Grand Jury shall at all times be entitled to legal counsel not involving delay and he may discuss with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt."

Mr. Gilmore: The word "fully" appears in there.

The Court: That means to me, that he can when seeking [fol. 297] legal advice, discuss with his lawyer what question has been asked and about which he wants legal advice. I cannot see how it means anything else, because if the legislature intended the law to go so far as you gentlemen claim it did and does, then it would have been a very, very simple matter to have said so.

Now, there is another provision in the law which to my way of thinking, conclusively establishes the fact that the legislature did not intend a lawyer to be present in the court room, and that is found in Section 28.946 of the Michigan Statutes Annotated, which is Section 6 of the One Man Grand Jury law.

Section 6 covers the matter of granting of immunity to a witness so that the witness may testify or be compelled to testify over his claim of constitutional rights not so to do.

Generally, the section provides that where a witness refuses to testify because his testimony might incriminate

him, he may be granted immunity by the Court and upon granting him immunity, he must testify. He is compelled to testify, for the reason that the Court has provided that he cannot be prosecuted for any crime or for any offense which might be based upon the testimony that he will give after the granting of immunity.

[fol. 298] The law is very specific about it. It requires that the questions asked of the witness be embodied in a motion made by the prosecuting attorney or the other duly authorized representative of the State. Then, it also requires that an order made by the Court must specify exactly what the questions are. Then, it goes further and it requires that a copy of the motion made by the prosecutor, a copy of the order made by the court, and a transcript of the testimony which is given by the witness after immunity is granted, be delivered to the witness.

If, what you gentlemen contend for is true, the lawyer for the witness who would be sitting in the court room, he could listen to the questions that were asked, he could hear the deliberations about whether immunity would or would not be granted, and he would have a right to sit in the court room after immunity was granted and still advise his client, his witness, as to his rights.

Now, here is what the law says, however, from Section 28.945 M.S.A.:

(Reading.)

"All such questions and the answers thereto,——"

That means question and answers after immunity is granted.

Now, continuing the quotation:

[fol. 299] (Reading.)

"Shall be reduced to writing under the direction of such judge, and a true copy of such writing under the direction of the judge, and a true copy of such transcript duly certified by such judge, shall be delivered to the witness as soon as practicable thereafter."

"The provisions for secrecy provided for in Section 3 hereof shall apply to all copies of such motion, order and transcript so delivered to such witness except

> that the witness may be privileged to disclose the same to his attorney if such witness should thereafter be prosecuted for any offense directly or indirectly growing out of any testimony given by him in such inquiry."

Now, if a lawyer were present, it would not be necessary to clamp secrecy upon an order or upon a motion and order and a transcript.

The lawyer would be here and he would hear it, but, the legislature provided that a man who was given immunity, [fol. 300] after being given a copy of the motion, the order granting him immunity, and a copy of the testimony, cannot discuss that with anybody, and the only time he can discuss that with an attorney is in the event he is thereafter charged with an offense which had its basis in the testimony he gave then.

Then he can show that order to an attorney and disclose it to him, but unless that happens, the witness is absolutely bound by secrecy and he cannot show it to anybody.

To me, the provisions of Section 28.946, Michigan Statutes Annotated, conclusively show what the legislature meant, and if an attorney was to be present in the court room all during the deliberations, clamping secrecy upon a motion and order even from the attorney would be a futile and useless thing.

Now, somebody might say, "Oh, yes, that is all right but you can sever the law there, and you can see that when the time comes that a witness is granted immunity, then, the Court must ask his attorney to depart from the court room."

Well, if you are going to do that, you are going to read another complication into the law, which the legislature never intended.

So, on the basis of what is in the Act itself, and that is [fol. 301] what a court must look to, in determining the intention of the legislature, it is very clear that the legislature intended that a witness might consult and get legal counsel, but it is also very clear that it did not intend that a lawyer should sit in the court room.

I had a quotation on that subject which I think will be interesting to inject here.

In determining what the intent of the legislature was with respect to secrecy, it is necessary to go back into the

history of Grand Jury proceedings and find out what the policy was with respect to secrecy in Grand Jury proceedings.

Every statement of law or decision which I have read or which has been referred to me confirms that the policy of the secrecy in grand juries is as old as grand juries themselves, and that never, never has any court in a grand jury proceeding admitted an attorney to the grand jury room so that he might counsel the witness upon a witness being interrogated before the grand jury.

The policy of grand juries has been, the policy of the law with respect to grand jury, I should say, has been that secrecy is a paramount adjunct of a grand jury because of secrecy that is why a grand jury may detect offenses and crimes which the law enforcing officers cannot. The se- [fol. 302] crecy and the power to subpoena and question in secret gives a grand jury something which no law enforcing officer possesses. According to law, and in addition to that secrecy, I might say here, there is one other adjunct of grand jury proceedings which is indispensable to the operation of a grand jury. That is the right to punish for contempt if the witnesses who come before the grand jury become contemptuous.

I would like to read an excerpt from 24 Amer. Juris., Sec. 47, page 865. The paragraph is entitled Grand Jury, Secrecy of Proceedings.

Mr. Colden: Pardon me, would you give me the page number again?

The Court: Page 865.

(Reading)

"It has long been the policy of law, in furtherance of justice, that the investigations and deliberations, of a grand jury, should be conducted in secret and that for most intents and purposes, all its proceedings should be legally sealed against divulgence. The policy is to inspire the jurors with a confidence of security in the discharge of their responsible duties, so that they may [fol. 303] deliberate and decide without apprehension of any detriment from an accused or any other person; to secure the utmost freedom of disclosure of alleged

crimes and offenses by prosecutors; to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it before the presentment is made; to prevent perjury and subornation of perjury by withholding the knowledge of facts testified to before the grand jury, which, if known, would be for the interest of the accused or his confederates to attempt to disprove procuring false testimony; and also to save the citizen the trouble, expense and disgrace of being arraigned and tried in the public on a criminal charge, unless there is sufficient cause for it."

That policy of secrecy has been adopted in Michigan and the Supreme Court in an early decision had before it not only the question of secrecy, but the very question that you gentlemen are raising, the right of an attorney to be present in a grand jury room when his client is on the witness stand.

[fol. 304] In the case of People vs. Lauder, 82 Mich., 109, Lauder was brought before a grand jury.

Mr. Jones: A One Man Grand Jury?

The Court: No, a grand jury.

Mr. Jones: Yes.

The Court: There is no distinction between the secrecy before a One Man Grand Jury and a Grand Jury. Both have been subject in the state of Michigan to the same provisions regarding secrecy, and the first time that the door has been opened or an attempt has been made to open the door, was when the section we are discussing here, Section 28.943 of the Michigan Statutes Annotated, was enacted:

Lauder was called before the grand jury, he was interrogated, he answered the questions. Later, he was indicted, and one of the questions raised by his lawyers was that he was taken before the grand jury, questioned, and upon his answers indicted. Then, his counsel claimed that he had no advice of counsel and he claimed that as a result the indictment was void.

This case arose in Wayne County and it arose under the grand jury law in effect at that time, in 1890.

I note that Mr. Lauder had two men that were considered

to be the experts on constitutional law in the State of Michi-
[fol. 305] gan at that time. Fred H. Warren and F. A. Baker, and they were the ones that presented this question to the Supreme Court.

I am going to read part of just one paragraph of the decision.

(Reading)

"He, that means Lauder, avers he was required and compelled and did make answers to the questions put to him. This is a conclusion from the facts. The rules of pleading in abatement required him to set forth the facts and not his conclusions. The same is true with the averment of the plea with reference to his being compelled to take his oath. But, as before observed, there was no violation of Lauder's constitutional rights in compelling him by subpoena to attend before the grand jury, nor in administering an oath to him. The real complaint made by the plea is that Lauder was subpoenaed to appear before the grand jury and he appeared in obedience thereto; that he was sworn, was interrogated, and answered all questions. He states [fol. 306] that all this was done without having the aid and advice of counsel, and 'because he did not have the assistance of counsel to bring out all the facts and circumstances of the case' he testified to facts material and necessary to prove the truth of the charges. As he was not upon trial for any offense, no exception can be taken to his not having the assistance of counsel; and, as he made no objection to testifying on account of privilege, I do not see why that should be appealed to as a ground for quashing the indictment."

In the Syllabus or this is one of the syllabi, and I think it states what the case holds on this point.

(Reading)

"As respondent was not upon trial for any offense, no exception can be taken to his not having the assistance of counsel."

Now, that is Michigan law; and it is Michigan Grand Jury law, and it is in point with the argument that until the legislature injected this provision in Section 28.943, there was no provision in Michigan whereby a person called as a witness could have advice of counsel, not presence of counsel, but even advice of counsel.

[fol. 307] Now, that was the law in this state the day that the legislature enacted Section 28.943. That is why I think that if the legislature intended that a witness was going to have his attorney in the court room with him, the legislature in opening the door of secrecy would have said so in plain, uncomplicated language, so it wouldn't be necessary for anybody to guess as to what the intent of the legislature was.

In another Michigan case, Bennett vs. Stockwell, 197 Mich., 50, page 50, our Supreme Court said on page 56:

(Reading)

> "It has long been the policy of the law in furtherance of justice that the legitimate investigations and the deliberations of a grand jury should be conducted in secret, and that for most intents and purposes its proceedings are legally sealed against divulgence. The grand jurors are sworn to keep secret the State's, their fellows', and their own counsel. The policy is to inspire the jurors with a confidence of security in the discharge of their legitimate and responsible duties, so that they may deliberate and decide without apprehen-
> [fol. 308] sion of any detriment from an accused or any other person; to secure the utmost freedom of disclosure of alleged crimes and offenses by prosecutors; to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it, before the presentment is made. That grand jurors cannot testify how they or any of their fellows voted or as to what induced them to find an indictment, or as to opinions expressed by their fellows or by themselves, upon any question properly before them and considered by them, is well settled."

Now, that brings the law of Michigan pretty well up to date.

Before, even recently, just last year, in the case of People vs. Pichitino, 337 Mich., 90, the Supreme Court said on page 97, this, again, was in connection with the 23 man grand jury, but it illustrates the policy of the law regarding grand juries:

(Reading)

> Defendants complain of the court's having required the grand jurors to administer an oath of secrecy to [fol. 309] to witnesses and court attaches appearing before it, Common Law, 1948, Section 767.9 (Statutes Annotated, Section 28.949), requires such oath of grand jurors. The legislative intent that grand jury proceedings be secret is manifest. The oath complained of is consistent therewith and in no wise violated the rights of the defendants."

So, right down to the present time, the policy of secrecy with reference to grand juries has been adhered to rigidly by the Supreme Court of this State.

This question of whether a lawyer may be present with a witness before a grand jury has been considered many times for quite some time and there are quite a number of cases on this subject. I am not going to attempt to review them but I am going to cite a couple of them.

The first one is entitled in re Black, 47 Federal, 2nd, 542, 543. It was in 1931, and the decision was written Justice August N. Hand, of the New York Circuit. Or Judge Hand, it is not justice, it is Judge Hand.

Judge Hand is regarded as one of the ablest lawyers in the United States. This is what he said:

(Reading)

"——

[fol. 310] Mr. Colden: May I agree with your Honor at that point.

The Court: Then perhaps you will agree with what he said when I get through.

Mr. Colden: But——

The Court: (Reading)

"The appellant——"

Mr. Jones: Was that a one man grand jury?

The Court: This was a grand jury in New York. It was in, it was a New York grand jury, a Federal grand jury, but I am speaking now of the policy that applies to grand juries and a reading of the multitude of decisions handed down by the Supreme Court of Michigan on questions of one man grand jury reveals this, that as far as the one man grand jury was concerned, it was subject to the same policies and the same rules with respect to secrecy and other matters as the 23 man grand jury.

But, I am now quoting from Judge Hand.

(Reading)

"The appellant insists that, before a witness is compelled to testify before a grand jury, he should be apprised of the subject matter of the inquiry or the names [fol. 311] of the persons against whom the inquiry is addressed, and that he should not be called upon to go unaided by counsel to an inquiry which is unlimited in scope and for which he is entirely unprepared. But the privilege of a witness against self incrimination is personal. Neither at a trial nor before a Grand Jury is he entitled to have the aid of counsel when testifying. It is hard to see then why he must be warned of the nature or extent of the testimony which is likely to be called for. A witness is not entitled to be furnished with facilities for evading issues or concealing true facts. Every bona fide investigation by a grand jury seeks to ferret out crime and criminals. To detect crime and to present charges against the guilty requires the most ample power of investigation. Frequently neither the nature of the crime itself, nor the identity of criminals can be forecast. To be compelled to state either in advance we think is likely unnecessary to [fol. 312] impede investigation and obstruct the administration of justice."

I said I am not going to quote from a number of decisions on this subject, but I do want to quote from one more, because it comes from a very respected court and in my opinion, states the law very accurately.

The case of the People vs. Cochrane, 307 Illinois, 126. The Supreme Court of Illinois said:

(Reading)

> "It is next argued that a right of the plaintiff in error was denied by refusing him the opportunity to consult with and be represented by counsel in the hearing before the court. To sustain that proposition, counsel cites Section 9 of Article 2 of the constitution guaranteeing that in all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, and the provisions of the criminal code that every person charged with crime shall be allowed counsel."

Then, breaking the continuity, but continuing with the quotation:

[fol. 313] (Reading)

> "Plaintiff in error did not come within either because he was not being prosecuted for crime, but his relation to the investigation was as a witness. One occupying that relation to a criminal prosecution is not entitled to have an attorney at his elbow to advise him whether he shall answer a question or to have proceedings suspended until he can find and consult an attorney."

COURT'S RULING

It is my opinion without going into the matter further, that under the provisions of the law cited here, that a witness was entitled to have legal counsel, meaning legal advice from an attorney without involving delay, but that he was not and is not entitled under the provisions of this statute before us to have his counsel in the grand jury room. So, the objections made to the jurisdiction of the court to hear this matter will be,——

Mr. Colden: Before your Honor rules on that——

The Court: (Continuing)—will be overruled.

Now, do you wish to say something?

[fol. 314] Mr. Colden: I was going to ask before you ruled,

—but if you are overruling, if you have made your ruling, there is no point in my answering it at this moment.

The Court: Well, I thought everybody was through talking when I started to give my ruling.

Mr. Colden: Well, I realize——

The Court: But if there is anything else you wish to say, Mr. Colden, I would be glad to hear it.

Mr. Colden: Maybe at the end, I might have something to put in the record.

The Court: Well, now, the next question is whether Mr. White was guilty of contempt of court, in refusing to answer questions.

The record of the testimony taken on Friday, May 21, 1954, shows Mr. White's attitude very clearly, as to his reasons for not answering the questions, but there is one thing the record does not show, and that was Mr. White's attitude, and I must say that his attitude was almost insolent in the manner in which he answered questions and his attitude upon the witness stand.

Mr. Colden: May it please the Court, I object to the remark, and ask it be stricken for the reason that——

[fol. 315] The Court: Just a moment. I have something else to say, Mr. Colden.

Not only was the personal attitude insolent, but it was defiant, and I want to put that on the record.

Mr. Jones: Well, it doesn't show.

Mr. Colden: Is that fair?

The Court: I am stating that as the judge sitting in the court who heard the testimony, that is the way it so appeared to me.

Mr. Jones: Well, I object to it, your Honor, and ask it be stricken from the record because it is not a part of the original record that was made on May 21, 1954.

The Court: That is something, Mr. Jones, that wouldn't appear on the record, but it would be very evident to the court.

Mr. Jones: I think his Honor could have stated at that time on the record and it didn't, because after all, his Honor filed an order to show cause to have the defendant show cause why he should not be cited for contempt of court, and nowhere in the transcript is that shown.

The Court: It couldn't be shown in the transcript, Mr.

Jones, because it is like those matters which the Supreme Court so often refers to, that a judge who hears a matter [fol. 316] has an opportunity to hear and see witnesses.

And he is in a position to comment on the attitude of a witness and that is what I am doing.

Mr. Colden: I believe, may it please the Court, that the record could show that that is the conclusion reached by your Honor as an individual and is not part of any of the facts upon which this order to show cause is based, and for that reason, I ask that it be stricken and expunged from this record as having absolutely no basis in fact or in law in here.

Now, the only reason the man is here, is a foregone reason and one reason alone and that is because he failed to answer questions without having counsel at his elbow, as has been put here repeatedly all morning. That is a moot question at the moment because the Supreme Court has not decided it and all the cases cited by your Honor are the result of 23 man grand juries in which this provision of law never was raised and could not have been raised because it was not part of the law fabric at that time, and I further say that to put on the record at this time an observation such as that, when it isn't, it is absolutely immaterial, and I therefore ask that it be expunged.

[fol. 317] Mr. Jones: May I have one other thing to say, your Honor?

At the beginning of the proceedings, his Honor, Mr. Rashid, asked this question, "Do you have any other names or nicknames or are you known by anything else?"

And here was his answer:

(Reading.)

> "I respectfully refuse to answer any and all questions hereafter unless my attorney is present with me here in court from the beginning until the end."

Now, that seems to be a very respectful answer to the court and to the prosecutor.

The Court: Mr. Jones, I am basing my statement upon what I saw and heard here myself.

Mr. Colden: Will your Honor rule on my request to expunge that remark?

The Court: Yes, your request will be denied.

Mr. Colden: I thank you, your Honor.

The Court: Now, that comes to the question of what is going to be done about it.

I have found that Mr. White is guilty, or I am going to find so, I think, Mr. White ought to stand up here.

[fol. 318] Mr. Jones: You find him guilty, is that it?

The Court: Yes, I am going to.

Just a moment. Stand up, Mr. White.

(Mr. White stands before the bench.)

The Court: Perhaps before I will state that I will find him guilty, I ought to ask Mr. White if he has anything to say for himself?

Mr. Jones: No, your Honor, he doesn't have anything to say.

The Court: Very well.

Mr. Jones: Because, after all, this has been a proceedings here, it isn't where a—I would respectfully ask the court after he renderes his decision to refer, to hold the sentence in abeyance because we plan to appeal to the Supreme Court just like any other.

SENTENCE

The Court: Well, I am going to find Mr. White guilty of of contempt of court, and I am going to impose a sentence upon him.

And the sentence of the Court is this. Mr. White will be confined in or at Detroit House of Correction for a period of ninety days, and that he pay a fine of $250.00.

Mr. Colden: May we have a stay of sentence for twenty [fol. 319] days? Will you set a bond, your Honor?

The Court: Yes.

Mr. Colden: Thank you, your Honor.

Mr. Jones: What will the bond be, your Honor?

The Court: I think I am going to say what you are going to suggest. I think that in view of Mr. White's standing, I think he owns property——

Mr. Jones: That is right.

The Court (Continuing): —and I believe a personal bond

would be sufficient, and I will fix his bail at $3500.00 and will accept his personal bond.

Mr. Jones: Thank you, your Honor. We will prepare that and submit it, your Honor.

The Court: I will also impose a condition that the bond will be voided unless an application for leave to appeal to the Supreme Court is filed within the statutory period.

Mr. Colden: Very well, your Honor, it will be filed.

The Court: Now, we had a bond last week, which you gentlemen prepared, do you know what it is?

Mr. Colden: Yes.

The Court: Now, you will pr-pare another bond like that, and submit it, and I will approve it.

[fol. 320] Mr. Jones: Very well, it will be prepared within the next hour.

Mr. Colden: Thank you, your Honor.

Mr. Jones: Will Mr. White be released to me until the bond is prepared?

The Court: Yes, yes.

(Thereupon an adjournment was taken until 2:00 o'clock P. M.)

[fol. 321] Detroit, Michigan, Friday, May 28, 1954, About 2:30 o'clock P. M.

(Thereupon the hearing of this matter was resumed pursuant to the adjournment.)

The Court: This is the John White matter which was heard this morning. I stated during the course of the proceedings that there were to be introduced two exhibits.

Mr. Gilmore: Will you mark these, please.

(Thereupon People's Exhibits Nos. 2 and 3 were marked for identification by the reporter.)

The Court (Continuing): Which should be introduced in evidence. Mr. Jones, Mr. Charles Jones, one of the attorneys appearing for Mr. White is now here and in order

to complete the record, I suggested to Mr. Gilmore that these exhibits be offered in evidence.

Mr. Gilmore: Let the record show I am handing the exhibits to Mr. Jones for his examination.

(Handing exhibits to counse-.)

The Court: I would also like to add to the record that these two documents are records of the proceedings of the [fol. 322] House of Representatives and Senate at the time that the amendments to the One Man Grand Jury Act were approved in 1951, and they show what the vote in each house was on the adoption of the amendment to the Act.

OFFER IN EVIDENCE

Mr. Gilmore: If the Court please, I offer in evidence Exhibit No. 2, being the official action shown as follows on passage of House Bill No. 3 by House of Representatives, both by which first conference report was rejected by house vote by which second conference report was adopted by house vote, being excerpt from the official house journal for the regular session of 1951, relative to the certain actions taken on House Bill No. 3 in furtherance of the so-called One Man Grand Jury Bill which became Act No. 276 P. A. 1951.

And that exhibit is certified as follows:

(Reading.)

"I, Norman E. Philleo, clerk of the House of Representatives of the State of Michigan, do hereby certify that the foregoing attached information relative to certain proceedings is taken by the House of Representatives on House Bill No. 3 of the Regular Session of 1951, is true and correct as shown by the official House journal for 1951."

[fol. 323] Signed at Lansing, Michigan, this 24th day of May, 1954, signature, in pen, "Norman E. Philleo, Clerk of the House of Representatives."

I also offer in evidence Exhibit No. 3, being excerpt from Senate Journal No. 88, May 17, 1951, on passage of House

Bill No. 3, which exhibit is certified by Fred I. Chase, as follows:

(Reading.)

"Certificate, State of Michigan.

I, Fred I. Chase, Secretary of the Senate, hereby certify that the attached pages contain a correct record of the vote on the passage of House Bill No 3, 1951 session, and the vote on the adoption of conference report on House Bill No. 3, 1951 session, together with a number of Senators present and not voting on the bill and conference report, respectively, and witness whereto I hereby attach my official signature, Lansing, this 24th day of May, 1954, signed, in ink, Fred I. Chase, Secretary of the Senate."

I offer Exhibits 2 and 3 into evidence.

[fol. 324] The Court: I would like to say that those are the two exhibits which I mentioned during the hearing this morning.

Have you any objection to them, Mr. Jones?

Mr. Jones: Yes, your Honor, I object to them as I remember your statement made this morning, the purpose of introducing them was to show that the bill was not passed by two-thirds majority, which is as I remember, and in view of that theory, I object to them for the reason that they would show that the entire Act is unconstitutional.

The Court: Well, they will be admitted in evidence.

Mr. Jones, you have no objection to the fact that we overlooked introducing them this morning?

Mr. Jones: No, I have no objection to that phase of it.

The Court: All right.

(Thereupon the hearing of this matter was concluded.)

[fol. 325] Stenographer's Certificate to foregoing transcript omitted in printing.

[fols. 326-327] EXHIBIT "B" TO CONCISE STATEMENT OF FACTS AND PROCEEDINGS

STATE OF MICHIGAN IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

No. 79821-3 Miscellaneous

In Re: Contempt Proceedings Against John White.

Transcript of Proceedings

Proceedings had and testimony taken in the above-entitled matter before the Honorable John P. O'Hara, Judge of the Recorder's Court, at Detroit, Michigan, on Monday, May 24, 1954.

APPEARANCES:

Joseph G. Rashid, Assistant Prosecuting Attorney, and Samuel J. Torina, Assistant Prosecuting Attorney, Appearing as attorneys on behalf of the People.

Charles W. Jones, Esq., and William L. Colden, Esq., Appearing on behalf of the Respondent.

[fols. 328-346]

Detroit, Michigan
Monday, May 24, 1954
About 10:45 o'clock A.M.

(Thereupon Court was opened by the Court Officer, Reiha.)

Mr. Rashid: If the Court please, may the record show pursuant to your Honor's order, the court room is open, both doors are open, in fact, wide open, and the witness, John White, is present in court with his counsel, Mr. Charles W. Jones, who filed an appearance and on his behalf this morning.

May the record also show that not only are the doors in the court room open, and that the witness is represented by counsel, but the press is also present in addition to other people.

[fols. 347-347a] (Thereupon an adjournment in this matter was had until Friday, May 28, 1954, at 9:30 o'clock A.M.)

[fol. 347b] [File endorsement omitted.]

[fol. 348] IN THE SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER GRANTING APPLICATION FOR LEAVE TO APPEAL—June 9, 1954.

In this cause an application is filed by petitioner for leave to appeal from an order of the Recorder's Court of the City of Detroit and nothing in opposition thereto having been filed by appellee and due consideration thereof having been had by the Court, It is ordered that the application be and the same is hereby granted.

In these matters it is ordered, in accordance with the motion of the Attorney General and the Prosecuting Attorney of Wayne County and pursuant to the stipulation of the parties, that the applications for leave to appeal and the appendices thereto may be regarded as records on appeal, that said matters may be consolidated and heard together and brought on for hearing as a motion on Tuesday, June 15, 1954, at 10 o'clock in the forenoon.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 349] IN THE SUPREME COURT OF MICHIGAN

[Title omitted]

ARGUMENT AND SUBMISSION—June 15, 1954

This matter having come on to be heard, is argued by Mr. Torina for the plaintiff and Messrs. Jones and Colden for the defendant and is duly submitted.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 350] IN THE SUPREME COURT OF MICHIGAN

In the Matter of John White.

46217

JUDGMENT—July 6, 1954

This matter having been brought to this Court by appeal from an order of the Recorder's Court of the City of Detroit, finding the said John White guilty of contempt of court, and having been argued by counsel, and due consideration thereof having been had by the Court, and it appearing to the Court that in the making of said order in said Recorder's Court there is NO ERROR, Therefore it is ordered and adjudged that the order of said Recorder's Court of the City of Detroit appealed from, be and the same is hereby affirmed.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 351] IN THE SUPREME COURT OF MICHIGAN

In re White

OPINION—Filed July 6, 1954

Before the Entire Bench

SOUTHERLAND, J.:

On March 16, 1954, Judge John P. O'Hara, one of the judges of the recorder's court for the city of Detroit, was selected and appointed to conduct a one-man grand jury to investigate police corruption in connection with gambling. On the following day he entered upon his duties, and the investigation commenced immediately.

In the course of the investigation, respondent, John White, was subpoenaed to testify before the grand jury on May 21, 1954. It was believed that John White possessed

information regarding police corruption that would assist the grand jury in its investigation. John White was sworn as a witness and the following occurred:

"By Mr. Rashid:

"Q. Your name, witness?

"A. John J. White.

"Q. Do you have any other names or nicknames, are you known by anything else?

[fol. 352] "A. I respectfully refuse to answer any and all questions hereafter unless my attorney is present with me here in the court from the beginning until the end.

"The Court: Your request to have your attorney here in the court room from the beginning to the end is denied, Mr. White.

"If there are any questions upon which you feel that you need the advice of your counsel, and it is done reasonably and not in such a way as to cause delays, you will be permitted to go out and talk to your attorney, but your attorney will not be permitted to be present in the court room.

"A. I still think I have that right, and I still respectfully refuse to answer any and all questions.

"* * *

"The Court: Mr. White, you have been asked where do you live. Would you answer the question?

"A. I refuse to answer.

"* * *

"Q. * * * How long have you lived in Detroit?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Do you drive an automobile?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. What is your business?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Do you have an interest in or do you own the Gotham Hotel?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Are you married?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Do you have a family?

"A. I refuse to answer unless my attorney is here with me at all times.

[fol. 353] "Q. Do you have an attorney?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Who is your attorney?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Do you have a father or mother or both?

"A. I refuse to answer unless my attorney is here in court with me at all times.

"Q. Do you have any children?

"A. I refuse to answer unless my attorney is here with me at all times, from the beginning to the end.

"Q. Do you own any real estate?

"A. I refuse to answer unless my attorney is here with me at all times, from the beginning to the end."

Other questions of like import were asked of the witness and like responses made.

On May 24, 1954, an order to show cause was entered requiring John White to show cause why he should not be punished for contempt for refusal to answer any and all material questions put to him as a witness before the grand jury. The order to show cause was returnable May 28, 1954, at 9:30 a. m. On the day in question, John White appeared before John P. O'Hara, as recorder's judge, in response to the order to show cause. He was represented by counsel, and it was stipulated that the transcript of the testimony given by White on May 21, 1954, before the grand jury be admitted in evidence. Counsel for respondent entered an objection to the proceedings before Judge O'Hara for the reason that Judge O'Hara, as recorder's judge, was disqualified from hearing a contempt of this [fol. 354] nature and based his objections upon CLS 1952,

§ 767.4 (Stat Ann 1953 Cum Supp § 28.944) which provides in part:

> "Provided, That the judge conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Judge O'Hara, as recorder's judge, overruled the objections and found respondent guilty of contempt and pronounced sentence. Upon application, leave to appeal to the Supreme Court was granted. This motion presents two questions, (1) Is a judge of the recorder's court for the city of Detroit, sitting as a judge of the recorder's court under CLS 1952, § 767.3 (Stat Ann 1953 Cum Supp § 28.943) disqualified by the provisions of CLS 1952, § 767.4 (Stat Ann 1953 Cum Supp § 28.944) from citing a witness for contempt and, thereafter, hearing the contempt proceedings himself, where the alleged contempt arose in the course of a grand jury investigation in the presence of him as the grand juror? (2) Is counsel for a witness called before a one-man grand jury entitled under CLS 1952, § 767.3 (Stat Ann 1953 Cum Supp § 28.943) to be present in the grand jury room during the testimony of his client? The answer to the first question brings into focus the status of a judge sitting as a one-man grand juror. In re Slattery, 310 Mich 458, we held that the judge conducting a one-man grand jury proceedings is acting in a judicial capacity. Nor does the fact that the one-judge grand jury is a judge of the recorder's court of the city of Detroit and not a circuit [fol. 355] judge change his status and authority as a judge for the reason that judges of the recorder's court were granted the same power possessed by circuit judges in so far as matters relating to crimes committed in the city of

Detroit are concerned. CL 1948, [§ 726.11 (Stat Ann) § 27.3561) reads as follows:

> "The said recorder's court shall have original and exclusive jurisdiction of all prosecutions and proceedings in behalf of the people of this state, for crimes, misdemeanors, and offenses arising under the laws of this state, and committed within the corporate limits of the city of Detroit, except in cases cognizable by the police court of the city of Detroit, or by the justices of the peace of said city; and shall have power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, *and to do all acts which the circuit courts of this state, within their respective jurisdictions, may, in like cases, issue and do by the laws of this state*: Provided, That this section shall not be construed to prevent the grand jury for the county of Wayne from inquiring into and presenting indictments, as heretofore, for crimes and offenses committed within the limits of said city." (Emphasis added.)

This brings us to the principal issue in the case, namely, the power of the court to punish for contempt committed in his presence as a grand juror. We held in Langdon v. Wayne Circuit Judges, 76 Mich 358, that courts of record have inherent power to hear and determine all contempts of court which the superior courts of England had at the common law. In Nichols v. Judge of Superior Court, 130 Mich 187 (195), we said:

> "The sound and reasonable rule of law is that, in the absence of express provision in the Constitution itself, the courts of record, established by the Constitution, are clothed by that instrument with the exclusive power over contempts,—a power which has existed from time immemorial. This rule is also established by a long line of authorities."

[fol. 356] In People v. Doe, 226 Mich. 5 (19), we said:

> "The power to punish for contempt is inherent in the court. It is a part of the judicial power. It is as firmly vested in the constitutional courts by the Constitution as is the exercise of any other judicial power. That the exercise of the judicial power and all of it can not be taken away from constitutional courts by the legislature is settled. The question is fully considered in Nichols v. Judge of Superior Court, 130 Mich. 187. See, also, In re Chadwick, supra, (109 Mich. 588); Carter v. Commonwealth, 96 Va. 791 (32 SE 780, 45 LRA 310); Bradley v. State, 111 Ga. 168 (36 SE 630, 50 LRA 691, 78 Am. St. Rep. 157); State 1. Woodfin, 27 NC 199 (42 Am. Dec. 161); Fisher v. McDaniel, 9 Wyo. 457 (64 Pac. 1056, 87 Am. St. Rep. 971)."

We are in accord with the reasoning of the court of Arkansas as defined in State v. Morill, 16 Ark. 384. We quoted with approval from the above case in Re Chadwick, 109 Mich. 588 (599):

> " 'The legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to this court by the Constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government, and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the Federal and State institutions, and a favorite theory in the governments of the American people. As far as the act in question goes, in sanctioning the power of the courts to punish as contempts the 'acts' therein enumerated, it is merely declaratory of what the law was before its passage. The prohibitory feature of the act can be regarded as nothing more than the expression of a judicial opinion by the legislature that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation, without the necessity of punishing as a contempt any matter not enumerated in the act. As such, it is entitled to great respect; but

to say that it is absolutely binding upon the courts would be to concede that the courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department; because, if the general assembly may deprive the courts of power to punish one class of contempts, it may go the whole length, and divest them of power to punish any contempt.' "

In Bielecki v. United Trucking Service, 247 Mich. 661, 666, and Attorney General v. O'Neill, 280 Mich. 649, 657, the Court quotes with approval from Kiley v. Chicago, M. & St. [fol. 357] P. R. Co., 138 Wis. 215, 226 (119 NW 309, 120 NW 756), and Thoe v. Chicago, M. & St. P. R. Co., 181 Wis. 456, 462, 466 (195 NW 407, 29 ALR 1280):

" 'The powers of the court and jury in the administration of the law in these respects were distinct and well defined at the time of the adoption of our Constitution and became vested in the court and jury by its provisions. They cannot be abrogated or modified by legislative action to the extent of impairing, in any degree, the judicial power. Under the Constitution courts have become vested with the judicial power to determine the questions of the legal sufficiency of the evidence to establish the rights of the parties at issue and to apply the law to the facts when found, and this power cannot be withdrawn from them and conferred on juries.' * * *

" 'The people of the State of Wisconsin, through the Constitution ordained by them, have conferred upon the courts of this State the judicial power, which includes the power finally to construe, interpret, and apply the law in private as well as public matters. The Constitution having confided this high prerogative to the courts, they would be plainly derelict in their duty if upon any pretense whatever they permitted the powers so confided to them to be exercised by other than judicial officers.' "

Article VII, Section 1, Michigan Constitution of 1908 provides that the judicial power shall be vested in the courts

therein enumerated "and such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general law." When the legislature, by the enactment of CL 1948, § 726.1 et seq. (Stat. Ann. § 27.3551 et seq.) provided for the recorder's court of the city of Detroit, it acted in the exercise of that constitutionally conferred power to establish "other courts." Having acted thus, the court so created under constitutional authority and provision, became a constitutional court of record, possessed of the inherent powers appertaining thereto, equally as in the case of the circuit and other courts enumerated in the constitution. It follows that the legislature has no power to deprive a constitutional court, such as a circuit court, of its power to punish for contempt [fol. 358] committed in its presence. And, inasmuch as the recorder's court of the city of Detroit possesses all the powers given circuit courts in the State of Michigan, "and to do all acts which the circuit courts of this state, within their respective jurisdictions, may, in like cases, issue and do by the laws of this state," it also follows that the legislature has no power to deprive a judge of the recorder's court of its power to punish for contempt committed in its presence. The conclusion is inevitable that when the legislature enacted CLS 1952, § 767.4 (Stat. Ann. 1953 Cum. Supp. § 28.944) in which it attempted to disqualify the grand juror from hearing a charge of contempt arising under CLS 1952, § 767.5 (Stat. Ann. 1953 Cum. Supp. § 28.945) it acted unconstitutionally and exceeded its powers in so doing.

It is also contended by respondent that a witness called before the grand jury is entitled to have his counsel present in the court room at the time the witness testifies before the grand jury. This claim arises out of CLS 1952, § 767.3 (Stat. Ann. 1953 Cum. Supp. § 28.943) which provides:

> "* * * Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. * * *"

Judge O'Hara, the grand juror, interpreted the act in question to mean that a witness might consult with legal

counsel, but did not intend that a witness had the right to have his lawyer sit in the court room while the witness was testifying. In coming to our conclusion upon this issue we take into consideration that a witness before a grand jury is [fols. 359-360] not on trial for any offense and that secrecy is a paramount adjunct of a grand jury. In People v. Lauder, 82 Mich. 109, it was held that a witness testifying before a grand jury had no right to have the assistance of counsel.

We do not think that the legislature intended, in enacting the above act, that a witness not on trial for any offense was entitled to have an attorney at his elbow to advise him whether or not he should answer a question put to him. We are of the opinion that the legislature intended that a witness was entitled to have legal counsel before or after being subpoenaed and prior to his being called as a witness, or at such other times in the discretion of the grand juror. We hold that a witness legally called to testify before a grand jury is not entitled to have an attorney with him when he is so testifying. There being competent evidence to sustain the conviction, the judgment is affirmed.

Edward M. Sharpe, Harry F. Kelly, Emerson R. Boyles, John R. Dethmers, Leland W. Carr, George E. Bushnell, Henry N. Butzel.

I concur in the result. Neil E. Reid.

[File endorsement omitted.]

[fol. 361] [File endorsement omitted]

IN THE SUPREME COURT OF MICHIGAN

[Title omitted]

Petition for Stay of Proceedings; Motion for Rehearing and Brief in Support Thereof—Filed September 1, 1954

PETITION FOR STAY OF PROCEEDINGS

John White, the above named petitioner respectfully shows as follows:

1. That on May 28, 1954, he was found guilty of contempt of court and sentenced to jail by the Honorable

John P. O'Hara, Judge of Recorder's Court for the City of Detroit sitting as a one-man grand jury.

[fols. 362-363] 2. That thereafter upon appeal duly taken to this court, this court did, on July 6, 1954, affirm the decision of Judge O'Hara finding petitioner guilty of contempt of court.

3. That pending said appeal, petitioner has been released on bail by Judge O'Hara upon a Two Thousand Dollar ($2,000) personal bond.

4. That petitioner is informed and believes and therefore alleges upon information and belief that there are substantial questions of constitutional and statutory law which should be further considered by this court upon the application for rehearing which petitioner intends to file within the time allowed by law.

5. That pending the filing of such petition for rehearing and the termination thereof by this court, petitioner desires to be continued on bail. That a request has been made to Judge O'Hara for such continuation but Judge O'Hara has indicated that such further stay and bond should be by order of this court.

Wherefore petitioner prays that this court order all proceedings stayed pending the filing of a petition for rehearing by him and the termination thereof by this court and that this court fix such bond as it may deem just and equitable in the premises to permit petitioner to be out on bail.

Charles W. Jones, William L. Colden and George Stone, By: William L. Colden, Attorneys for Petitioner.

[fol. 364] MOTION FOR REHEARING

Now come the above named Lee Roy Murchinson and John White and move the court for rehearing on its decisions affirming their convictions, and say:

1. This court erred in holding that the Recorder's Court for the City of Detroit is a constitutional court of record.

2. This court erred in holding that the act in question, sections 28.943 and 28.944, M. S. A. was an unconstitutional encroachment upon the authority of the Recorder's Court.

3. This court erred in not holding that, if such sections were unconstitutional, then Act 276 P. A. 1951, failed to express the legislative will and was therefore wholly void.

4. This court erred in holding that a respectful failure to answer because of an honest belief that he had the right to counsel, which right could only be finally determined by this court, was an obstruction of justice and a contempt of court.

5. This court erred in holding that the defect inherent in a conviction for contempt in secret session can be cured by a subsequent hearing on an order to show cause.

For the reasons aforesaid, this court should grant a rehearing on its decisions affirming their convictions and upon such rehearing reverse their convictions.

Charles W. Jones, William L. Colden and George Stone, By: William L. Colden, Attorneys for Lee Roy Murchison and John White.

[fol. 365] William L. Colden, one of the attorneys for the above named Lee Roy Murchison and John White hereby certifies that the foregoing motion for rehearing is made in good faith and not for the purpose of delay.

William L. Colden.

Peoples Memorandum in Opposition to Respondent's Motion for Rehearing

In reply to the brief filed by the respondents in support of their motion for rehearing, the People say:

I

This court's opinion in the instant case completely answers respondent's contentions I and II, to the effect that the Recorder's Court for the City of Detroit is not a constitutional court of record whose powers to punish for contempt cannot be abridged by the legislature, and the

M. S. A. 28.943 and M. S. A. 28.944 do not encroach upon the authority of the Recorder's Court.

We cite the pertinent language of the court to substantiate our position:

> "Article VII, Section 1, Michigan Constitution of 1908 provides that the judicial power shall be vested in the courts therein enumerated 'and such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general law,' when the legislature, by the enactment of C. L. 1948, Sec. 726.1 *et seq.* (Stat. Ann. Sec. 27.3551 *et seq.*) provided for the recorder's court of the city of Detroit, it acted in the exercise of that constitutionality conferred power to establish [fol. 366] 'other courts.' Having acted thus, the court so created under constitutional authority and provision, became a constitutional court of record, possessed of the inherent powers appertaining thereto, equally as in the case of the circuit and other courts enumerated in the constitution. It follows that the legislature has no power to deprive a constitutional court, such as a circuit court of its power to punish for contempt committed in its presence. And, inasmuch as the recorder's court of the city of Detroit possess all the powers given circuit courts in the State of Michigan, 'and to do all acts which the circuit courts of this state, within their respective jurisdictions may, in like cases, issue and do by the laws of this state,' it also follows that the legislature has no power to deprive a judge of the recorder's court of its power to punish for contempt committed in its presence. The conclusion is inevitable that when the legislature enacted CLS 1952, Sec. 767.4 (Stat. Ann. 1953 Cum. Supp. Sec. 28.944) in which it attempted to disqualify the grand juror from hearing a charge of contempt arising under CLS 1952, Sec. 767.5 (Stat. Ann. 1953 Cum. Supp. Sec. 28.945) it acted unconstitutionally and exceeded its powers in so doing."

II

In paragraph III of respondent's motion for rehearing it is contended that Act 276, P. A. 1951, however construed by this court, does not express the legislative "interest" and is wholly void. We presume that respondents mean here that the act does not express the legislative "intent" and not "interest."

As stated in People's prior brief, Section 8.5 C. L. 1948 permits such severability:

> [fol. 367] "In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say: If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not effect the remaining portions or applications of the act which can be given effect without the invalid portion or application, providing such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable."

The People also wish to point out that the alleged abuses of the grand jury, which the respondents continually harp upon, are exaggerated. Hearings of contempt in open court, such as occurred in the instant cases, have cured all of the so-called abuses, and adequately protect the rights of the respondents in contempt cases arising out of grand jury hearings.

The respondents contend that the authority of a recorder's court judge to punish for contempt has not been taken away by the act in question, but has merely been transferred to another, impartial member of the court. The power to punish for contempt, claim the respondents, does not belong to the individual officer but belongs to the court as a whole.

This contention of respondents has been answered time and again by this court in the multitude of opinions which it handed down, and specifically in *In re Slattery*, 310 Mich. 456, at p. 467, where Justice Butzel stated:

> "So that there may be no further question, we hold that the judge conducting a one-man grand jury proceeding is acting in a judicial capacity."

[fol. 368] Since the one-man grand juror is acting in a judicial capacity, the power to punish for contempt is a personal one and adheres to him by virtue of his office, and any transfer to another member of the tribunal is an encroachment upon his judicial powers to punish for contempt. In our prior brief, we quoted from *In re Debs*, 158 U. S. 594:

> "To submit the question of disobedience (of court order) to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

And we also quoted from *Watson v. Williams*, 36 Miss. 331, 341, where the court said:

> "The power to fine and imprison for contempt from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. *It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law.* A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its order, judgments or decrees against recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it." (Emphasis added.)

We believe that these citations conclusively answer respondents' contentions in this regard.

III

The respondents also claim that the intent of the legislature is the test by which the constitutionality of an act is to be determined.

[fol. 369] If this claim were true, no act of the legislature could ever be held to be unconstitutional by a court. It is axiomatic that when a court declares a legislative act unconstitutional, it acts contrary to the wishes of the legislature. The test is not the intent of the legislature, but whether the act in question is in accord with the constitution of the state, and, it is the function of the courts to make this determination.

In the instant case, this court held that the legislature by disqualifying the grand juror from hearing his own contempts involving the refusal to answer questions encroached upon the powers of the judiciary. This was clearly an unconstitutional act, and properly held void by this court.

IV

As Ground IV of the motion, it is asserted John White was not in contempt of court because his refusal to answer was a respectful one and based upon his honest belief that it was right to do so under the statute.

John White's attitude in making his answers can hardly be characterized as respectful. Judge O'Hara referred to it as "Almost insolent" and "defiant." We quote from the contempt proceedings against John White, dated Friday, May 28, 1954, page 55, to substantiate our claim:

> "The Court: * * * The record of the testimony taken on Friday, May 21, 1954, shows Mr. White's attitude very clearly, as to his reasons for not answering the question, but there is one thing the record does not show, and that was Mr. White's attitude, and I must say that his attitude was almost insolent in the manner in which he answered questions and his atti-
> [fol. 370] tude upon the witness stand.
>
> Mr. Colden: May it please the Court, I object to the remark, and ask it be stricken for the reason that——
>
> The Court: Just a moment. I have something else to say, Mr. Colden. Not only was the personal attitude

> insolent, but it was defiant, and I want to put that on the record."

The People have already answered the contention of respondents regarding the allegations in the order to show cause. As stated in the prior brief of the People, the order to show cause was intended by the judge to notify the respondents of the charge against them. It acquainted them with the fact that there was probable cause in the opinion of the judge to indicate that they had been guilty of contempt. The order to show cause was also intended to notify the respondents of the date and time when the hearing would be held in open court in order that they might prepare themselves for the proceedings. Thereafter, the hearings were held in open court, and respondents were represented by counsel of their own choice; they were given every opportunity to confront and cross-examine witnesses; Murchison was given opportunity to present an alibi; and arguments in their behalf were presented by their attorneys. This procedure was strictly in accord with the requirements of the *Oliver* case, as propounded by Justice Black:

> "Except for a narrowly limited category of contempts, due process of law as explained in the Cook case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, [fol. 371] and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation." In *re Oliver*, 33 U. S. 258, 275.

V

Respondents claim that the conviction was in camera and therefore unconstitutional. To make such an assertion is to ignore the proceedings which were had in the instant case. As has been pointed out in the previous paragraph and in our preceding briefs, the hearings were held in open court; the respondents were given every opportunity to confront and cross-examine witnesses; they were repre-

sented by attorneys; were given an opportunity to present an alibi; and to present all legal arguments in their behalf; reporters were admitted into the courtroom; the public was also allowed in the courtroom. All the elements of a hearing in open court were present. What other requirements for a hearing in open court would be necessary in order to satisfy the respondents is difficult to understand.

VI

The court's attention is directed to the fact that in the application for rehearing, no arguments advanced therein apply to Murchison. It is admitted that M. S. A., Sec. 28.943, in no manner precludes the judge from hearing a contempt involving perjury inasmuch as the only contempt which the grand juror was deprived from hearing was the refusal to answer questions.

[fol. 372] CONCLUSION

The People believe that a rehearing on this matter is unnecessary. All the arguments proposed by the respondents in the present motion have been fully discussed and adjudicated by this court. Oral argument was also presented thereon. All of the points were decided against respondents by an unanimous court in an opinion filed July 6, 1954.

Since the matters urged in the petition for rehearing have been considered and determined in the said appeal, it is urged that this motion for rehearing be denied. In support of our position, we quote *Taylor* v. *Boardman*, 24 Mich. 287:

> "An application for a rehearing, based upon a showing of facts that were already upon the record, or that would not materially alter or add to the case made on the first hearing, will be denied." (Headnote.)

Respectfully submitted, Gerald K. O'Brien, Prosecuting Attorney, County of Wayne; Samuel J. Torina, Assistant Prosecuting Attorney, 500 Police Headquarters Bldg., Detroit 26, Michigan.

Dated at Detroit, Michigan, August 3, 1954.

[fol. 373] Brief in Support of Motion for Rehearing

I

The Recorder's Court for the City of Detroit is not a Constitutional Court

The opinion of this court holds that the Recorder's Court is a constitutional court and therefore its powers cannot be abridged by the legislature.

But Art. VII, section 1, of the Constitution vests the judicial power in certain named courts and in "such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general law." The Recorder's Court was established by the legislature under the constitutional provision as an "other court." It therefore became not a constitutional court, as the opinion says, but a legislatively created one and subject to legislative control. The holding of this court would mean that every court created in this state would be a constitutional court.

As early as *Nichols* v. *Judge of Superior Court*, 130 Mich. 187, it has been held:

> "The legislature is, by the Constitution, authorized to establish municipal courts of criminal and civil jurisdiction. Const. Art. 6, Sec. 1. *The superior court of Grand Rapids is a creation of the legislature, with such powers and jurisdiction as the legislature has seen fit to confer upon it.*" (Emphasis supplied.)

And again in *Dunham* v. *Tilma*, 191 Mich. 688, it was held:

> [fol. 374] "This is not the case with municipal courts. They are not created by the Constitution, but are only authorized and permitted. They derive all their powers from the legislature. *Nichols* v. *Judge of Superior Court, supra.* And the legislature may give them large or limited powers."

In *13 C. J.* p. 47, the rule is summarized:

> "Except when the legislature is given authority to prescribe the limit of the court's power to punish

for contempt, it can neither destroy nor abridge such power, *although it may regulate its use, and has the right to limit control over contempts in those courts which are of its own creation.*" (Emphasis supplied.)

In *re Fite*, 11 Ga. App. 665, it was said:

"If the court be statutory, that is, having only legislative sanction for its existence, its power to define and punish contempts may be limited by statute."

And in *Nichols* v. *Judge of Superior Court*, 130 Mich 187, this court said:

"The superior court of Grand Rapids is a creation of the legislature, with such powers and jurisdiction as the legislature has seen fit to confer upon it. We must, therefore, look to the act of the legislature establishing this court to determine what power is given it over the subject of contempts."

We submit the Recorder's Court is not immune from control by the legislature.

[fol. 375]

II

Sections 28.943 and 28.944, M. S. A. Do Not Encroach Upon the Authority of Recorder's Court

This court's opinion holds that insofar as the act prevents Judge O'Hara from passing on the contempts committed before him, it is an encroachment by the legislature upon the judiciary. The error, we think, lies in the fact that "the judge" and "the court" have, improperly been used interchangeably. A judge is by no means a court. He is only a part of a court.

"A court is not a judge, nor a judge a court. A judge is a public officer, who, by virtue of his office, is clothed with judicial authority. A court is defined to be a place in which justice is judicially administered. It is the exercise of the judicial power, by the proper officer or officers, at a time and place appointed by law." *Todd* v. *U. S.*, 158 U. S. 275.

The legislature has nowhere taken away the authority of the Recorder's Court to punish for contempt. It has merely directed that another, impartial member of that court, shall hear the contempt charge or the further proceeding. The power to punish for contempt does not belong to the individual officer but belongs to the court as a whole. See *13 C. J.* p. 53, Sec. 72.

In *13 C. J.* p. 53, Sec. 72.

> "Since contempt proceedings are substantially criminal in their nature, one court is not authorized to punish a contempt against another court or judge, unless such court or judge is an agency or part of the court inflicting the punishment, as for instance, where the court is composed of several divisions * * *."

[fol. 376] In *Melton* v. *Com.*, 160 Ky. 642, it was held that where a circuit court is divided into several divisions, it was still but one court and a contempt against any one judge or division was a contempt of the whole court and could be proceeded against by any one of the divisions.

We believe that this court was in error in holding that the statute has abridged the authority of the Recorder's Court to punish for contempt.

III

Act 276, P. A. 1951 as Construed by the Court does not Express the Legislative Interest and is Wholly Void

This court may well take judicial notice of the public and legislative furor attending the abuses under the old one-man grand jury statute, culminating in the *Oliver* case in the United States Supreme Court. See *People* v. *Pichitino*, 337 Mich. 90, 94. This court must know then that it was the legislative intent to prohibit the one-man grand juror from sitting as examining magistrate or hearing contempts in those cases in which he had acted as the inquisitor. If these safeguards are to be struck down, as this court has now done, the emasculated statute not only does not reflect the intent of the legislature but expressly violates it. This court must, on further considera-

tion hold Act 276 in its entirety void. *Mulher* v. *Judge*, 111 Mich. 528.

[fol. 377] A Respectful Refusal to Answer Based Upon An Honest Belief of His Right to Do So Under The Statute is Not a Contempt

John White did not in fact refuse to answer. He did say that he would answer if he could have his counsel present. He had been advised by his attorney that the statute gave him this right. This court had not yet ruled otherwise. We think the court is in error in holding that this constitutes an obstruction of justice. The witness is then made to suffer for relying upon the honest opinion of his attorney on a point of statutory construction which this court has now, for the first time held to be wrong.

In *re Zeigler Co.*, 189 Fed. 259, a state court bankruptcy receiver refused to turn over property to a federal court receiver. The court held that his refusal to do, based upon his attorney's opinion that the state court's jurisdiction was paramount, would not constitute a contempt.

The refusal of White to answer other than as he did, did not constitute a contempt. His refusal now, if this court abides by its decision, may constitute a contempt.

V

[fol. 378] The Conviction of Appellants was in Camera And Unconstitutional

As appears from the orders to show cause both appellants had already been adjudged guilty of contempt when the hearings on the orders to show cause were had. Those orders were not orders to show cause why they should not be found guilty of contempt but to show cause why they should not be *punished* for contempt.

As approved by this court, the procedure before Judge O'Hara was just as defective as that condemned by the United States Supreme Court in the *Oliver* case. Here, as there, Judge O'Hara switched from grand juror to judge, and without hearing adjudged appellants guilty of contempt,

and summoned them in for punishment. The fact that at this later hearing they were afforded the opportunity to put in a defense is not the answer. Judge O'Hara had already prejudged their cases.

Justice Frankfurter in his dissenting opinion in the *Oliver* case said (333 U. S. 257, 284):

> "It would not be fair, if the courtroom in which the accused can contest for the first time the validity of the charge against, he comes handicapped with a finding against him, which he did not have an adequate opportunity of resisting."

[fol. 379] We submit a rehearing should be granted and on such rehearing the sentences of appellants reversed.

Respectfully submitted, Charles W. Jones, William L. Colden and George Stone, By: William L. Colden, Attorneys for Appellants.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 380] IN SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER GRANTING MOTION FOR STAY OF PROCEEDINGS—July 22, 1954

In this cause a motion is filed by the said John White for a stay of proceedings, and nothing in opposition thereto having been filed, and due consideration thereof having been had by the Court, It is ordered that the sentence of the Recorder's Court of the City of Detroit appealed from be and the same is hereby stayed pending the submission and determination of an application for rehearing, or until the further order of this Court.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 381] IN SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER ALLOWING AND SETTING THE AMOUNT OF BAIL—July 22, 1954

In this cause a motion is filed by defendant for the allowance of an order to let to bail pending the submission and determination of a motion for rehearing, and nothing in opposition thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, It is ordered that the said defendant be admitted to bail pending the determination of the rehearing herein as aforesaid, and until the further order of this Court.

The conditions of this order are as follows: the defendant shall file with the Clerk of the Supreme Court a bond in the penal sum of three thousand dollars, with sufficient sureties. Te defendant, after due notice given to the Prosecuting Attorney of Wayne County of the time and place when and where said bond will be presented, shall present the same to the Clerk of the Recorder's Court for approval of the bond and the sureties. Said bond shall be conditioned for defendant's appearance before and performance of any order which this Court may make in the premises, and conditioned further that this cause be submitted as speedily as possible.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 382] IN SUPREME COURT OF MICHIGAN

[Title omitted]

MINUTE ENTRY—September 1, 1954

In this cause a motion for rehearing is duly submitted.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 383] IN SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER DENYING REHEARING—September 8, 1954

A motion for rehearing having been heretofore submitted herein, It is hereby denied.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 384] IN SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER STAYING PROCEEDINGS—September 14, 1954

In this cause a motion is filed by the said John White for a stay of proceedings pending his application for a writ of certiorari in the Supreme Court of the United States, and the motion having been conditionally consented to by the Attorney General, and due consideration thereof having been had by the Court, It is ordered that all proceedings in the cause be and the same are hereby stayed pending the filing of petitioner's application for a writ of certiorari in the Supreme Court of the United States, on condition that the petitioner file with the Clerk of this Court a bond in the penal sum of three thousand dollars, with sufficient sureties, such bond to be approved by the Clerk of the Recorder's Court of the City of Detroit, after due notice to the Prosecuting Attorney of Wayne County, such bond to be filed on or before September 17th, 1954, and such bond to be conditioned on petitioner's filing in the Supreme Court of the United States his application for a writ of certiorari within thirty days from and after this date.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 385] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 386] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 405

In the Matters of Lee Roy Murchison and John White, Petitioners.

ORDER ALLOWING CERTIORARI—Filed December 6, 1954

The petition herein for a writ of certiorari to the Supreme Court of the State of Michigan is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
OCT 11 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 405

In the Matter of

LEE ROY MURCHISON

In the Matter of

JOHN WHITE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND APPENDIX

COBB, HOWARD AND HAYES,
Attorneys at Law
613 F Street, N. W.

By:

JAMES A. COBB
GEORGE E. C. HAYES,
Counsel of Record for the Petitioners

Of Counsel:
WILLIAM L. COLDEN,
Attorney at Law
1308 Broadway
Detroit, Michigan

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
REFERENCE TO OFFICIAL REPORTS	2
JURISDICTION	2
a. Date of judgment and time of entry	2
b. Motion as to re-hearing and time of entry	2
c. Statutory provisions conferring jurisdiction	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED	3
CONCISE STATEMENT OF FACTS	4
ISSUES RAISED IN STATE COURT	8
ARGUMENT	11
Question No. 1	11
Question No. 2	12
Question No. 3	14
Question No. 4	15
SUMMARY	16
APPENDIX	18
Sections 28.943-28.944; Michigan Statute Annotated; Callaghan's Pocket Supplement, 92-103	18-25
Art. IV. of the Michigan Constitution of 1908: Division of the Powers of Government	25
Fourteenth Amendment of the Constitution of the United States	25
Order to Show Cause	26-28
Opinion of Recorder's Court Re: Murchison	28-49

Page

Opinion of Supreme Court, State of Michigan
Re: Murchison 49-53
Re: White 54-62
Stipulation, Supreme Court, State of Michigan
Re: Murchison and White 62, 63
Application For Leave to Appeal
Re: Murchison 64-67
Re: White 68-71

TABLE OF CASES

Coblentz v. State, 164 Md. 558, 166 A. 45 13
Hurtado v. Louisiana, 110 U.S. 480, 23 L. Ed. 682 .. 13
In Re Slattery, 310 Mich. 458, 17 N.W. (2nd) 249 12
In Re Oliver, 333 U.S. 257, 92 L. Ed. 682 .....11, 13, 15, 16
Kennard v. Louisiana, 92 U.S. 480, 23 L. Ed. 478 12
Moore v. Dempsey, 261 U.S. 85, 67 L. Ed. 543 14
Prentiss v. Atl. Coast Line, 211 U.S. 210, 53 L. Ed. 150 13
State v. Lawler, 221 Wis. 432 13

CONSTITUTIONAL PROVISIONS AND STATUTES

14th Amendment of Constitution of the United States 5
Art. IV of the Constitution of the State of Michigan .. 5, 12
Michigan Statutes Annotated, 1953, Cumulative Supplement, Paragraphs 28.943, 28.944 .....5, 7, 15
Public Act No. 276, 1951, State of Michigan 14

IN THE

Supreme Court of the United States

October Term, 1954

No.

In the Matter of

LEE ROY MURCHISON

In the Matter of

JOHN WHITE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

The two cases of Lee Roy Murchison and John White are combined for the purposes of this petition seeking certiorari in that the two causes were combined for the purposes of the issues raised in the Supreme Court of Michigan, and the questions raised in the two causes are identical questions or questions very closely related.

John White and Lee Roy Murchison herein pray that a writ of certiorari issue to review respective judgments of the Supreme Court of the State of Michigan entered on the 6th day of July, 1954.

REFERENCE TO OFFICIAL REPORTS

Review is sought of the opinion of Judge John P. O'Hara, Judge of the Recorder's Court for the City of Detroit, State of Michigan, and of the cases of In re White, 340 Mich 140, and In re Murchison, 340 Mich 151. (The opinions in the respective cases to be set forth in the Appendix).

JURISDICTION

a. The opinions and judgments of the Supreme Court of Michigan affirming the judgments of the Recorder's Court of the State of Michigan a to both petitioners were entered on the 6th day of July, 1954. (R. p. 190)

b. On the 9th day of July, 1954, a motion for re-hearing and petition for stay of proceedings were filed. (Record p. 194). As of the same day, July 9, 1954, the petition for stay of proceedings was granted and the motion for a re-hearing was subsequently denied (Record p. 194). After the denial of the motion for a re-hearing, a petition for stay of proceedings pending application for leave to file for a Writ of Certiorari with the United States Supreme Court was granted allowing the filing of a petition for certiorari within thirty (30) days from the 14th day of September, 1954.

c. The jurisdiction of this court is invoked to review the judgments of the Supreme Court of the State of Michigan in the respective cases by Writ of Certiorari under the terms of Title 28, United States Code Annotated, Section 1257 (3). Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

> ". . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immu-

nity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercises under, the United States. June 28, 1948, c. 646, 62 Stat. 929."

QUESTIONS PRESENTED

1. Is the one man grand jury statute constitutional?

2. Can the Judge at one and the same time be a one man grand jury and still have the inherent power to adjudicate one in contempt while acting in a so-called judicial capacity without violating the concept of due process of law as assured by the 14th Amendment of the Constitution of the United States?

3. Does the interpretation given to Section 28.944 of the Michigan Statute by the Supreme Court of Michigan amount to a denial to the petitioners of their constitutional rights of due process?

4. Was not the interpretation of the Supreme Court of Michigan of Section 28.943, Michigan Statute Annotated, to the effect that "a witness was entitled to have legal counsel before or after being subpoenaed, and prior to his being called as a witness, or at such other times in the discretion of the grand juror" not only an expressed violation of the terms of the Michigan Statute but a violation as well of the constitutional rights of the petitioners?

CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

Sections 28.943-28.946; Mich. Stat. Anno.; Callaghan's Pocket Supplement, pages 92-103. (In appendix hereto.)

Art. IV of the Michigan Constitution of 1908: Division of the Powers of Government. (In appendix hereto.)

Fourteenth Amendment of the Constitution of the United States. (In appendix hereto.)

A CONCISE STATEMENT OF FACTS

In the Matter of John White

On March 16, 1954, Judge John P. O'Hara, one of the Judges of Recorder's Court for the City of Detroit, County of Wayne, State of Michigan, was selected and appointed to conduct a one man grand jury under Section 28.943, Michigan Statutes Annotated, and following sections appurtenant thereto, to investigate police corruption in connection with gambling. He entered upon his duties the following day and the investigation commenced immediately.

The petitioner herein, John White was subpoenaed to testify before Judge John P. O'Hara, grand juror, on May 21, 1954, and in response to said subpoena did appear before Judge John P. O'Hara sitting as a one man grand juror on May 21, 1954.

On examination before Judge John P. O'Hara, the petitioner White stated his name and on being asked other questions declined to answer and did refuse to answer any questions "unless my attorney is here with me at all times, from the beginning to end."

On May 24, 1954, an order to show cause was entered requiring John White to show cause why he should not be punished for contempt for refusal to answer any and all material questions put to him as a witness before the grand jury. The order to show cause was returnable May 28, 1954 at which time petitioner herein did appear in response to said order returnable before John P. O'Hara as Recorder's Judge. By stipulation the transcript of testimony given by White on May 21, 1954, before the grand jury was admitted in evidence. The essence of that transcript of testimony is to the effect that White refused to answer unless accompanied by counsel as hereinbefore set forth. Counsel for the respondent entered an objection to the proceedings before Judge O'Hara for the reasons the Act in question was unconstitutional and that Judge O'Hara as Recorder's Judge was disqualified from hearing a contempt of this nature and based these objections upon the

14th Amendment of the Constitution and Article IV of the Michigan Constitution, Michigan Statutes Annotated, 1953 Cumulative Supplement, Paragraph 28.944 which provides in part:

> ". . . The Judge conducting an inquiry under Section 3 of this Act shall be disqualified from acting as the examining magistrate in connection with the hearing on any complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under Section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Judge O'Hara overruled the objections and found the respondent guilty of contempt and sentenced him to be confined in and/or at Detroit House of Correction for a period of Ninety (90) days and that he pay a fine of Two Hundred Fifty ($250.00) Dollars. Counsel for petitioner requested a stay of proceedings until application for leave to appeal to the Supreme Court for the State of Michigan was granted. Judge O'Hara granted a stay of proceedings and upon applying for leave to appeal the same was granted.

The application for leave to appeal posed the following questions: (1) Is the Statute in question unconstitutional because it is contrary to the due process clause of the Fourteenth Amendment, Art. IV of the Michigan Constitution? (2) Is a Judge for the Recorder's Court under C.L.S. 1952, Paragraph 767.3, M.S.A. Cum. Supp., Paragraph 28.943, disqualified by the provisions of C.L.S., 1952, Paragraph 767.4, M.S.A. Cum. Supp. Paragraph 28.944, for citing a witness for contempt and thereafter hearing the contempt proceedings himself where the alleged contempt rose in the course of a grand jury investigation in the presence of him as a grand juror? (3) Is counsel for a witness called before a one man grand jury entitled under C.L.S. 1952, Paragraph 767.3 M.S.A., Cum.

Supp. Paragraph 28.943 to be present in the grand jury room during the testimony of this client? The Michigan Supreme Court on July 6, 1954, affirmed the lower Court. (4) In assuming the duties of a grand jury, did Judge O'Hara continue to be vested with judicial functions and/or safeguards while acting in an administrative capacity? (5) Does the legislature have the authority to impose upon the judiciary duties that are not judicial?

The petitioner immediately filed a motion for a rehearing with the Supreme Court for the State of Michigan, and the petitioner was released on bail in the amount of Three Thousand ($3,000.00) Dollars by the Court pending a decision on the motion for rehearing. That on the 8th day of September, 1954, the Court denied the motion for rehearing. That following the denial of the motion for rehearing the petitioner White made application for a stay of proceedings with the Court pending his application to the Supreme Court of the United States of America for leave to file a Writ of Certiorari to review the proceedings hereinbefore set forth.

On the 14th day of September, 1954, the Court granted a stay of proceedings pending application for Writ of Certiorari in the Supreme Court of the United States conditioned that said application be filed within thirty (30) days from the 14th day of September, and the petitioner was released on bond in the sum of Three Thousand ($3,000.00) Dollars.

In the Matter of Lee Roy Murchison

That the petitioner, Lee Roy Murchison, was subpoenaed to testify before Judge John P. O'Hara, grand juror, and in response to such subpoena did appear on that date before Judge John P. O'Hara sitting as a one man grand jury.

On examination before Judge John P. O'Hara, the petitioner, Murchison, did testify with respect to visits made by him to the residence of one Edward Stephens. The

petitioner denied in secret session ever having visited the residence of Edward Stephens and was contradicted by two police officers. The other police officer, to wit, a Lieutenant of the Police Department and an Inspector, testified that they had seen Murchison visiting the home of Edward Stephens at 945 Josephat, Detroit, Michigan and introduced a purported picture of Murchison on the front porch of that address.

On May 24, 1954, Judge O'Hara acting as a one man grand jury issued an order to show cause directed to the petitioner requiring him to show cause why he should not be punished "for criminal contempt of this Court" for false swearing. This order to show cause was returnable on a day certain, and beginning Monday, May 10, 1954 and continuing through Wednesday, May 14, 1954, the petitioner did appear in response to said order returnable before Judge O'Hara. Counsel for petitioner entered an objection to the proceedings before Judge O'Hara for the reasons that the Statute was unconstitutional and that Judge O'Hara as Recorder's Judge was disqualified from hearing a contempt of this nature and based his objection upon Michigan Statutes Annotated 1953 Cumulative Supplement, Paragraph 28.944 which provides in part:

> ". . . The Judge conducting an inquiry under Section 3 of this Act shall be disqualified from acting as the examining magistrate in connection with the hearing on any complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under Section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Judge O'Hara overruled the objection and found the respondent guilty of contempt and sentenced him to be confined in the County Jail of Wayne County for a period of Sixty (60) days. Counsel for petitioner requested a stay of proceedings until application for leave to appeal

to the Supreme Court for the State of Michigan was granted. Judge O'Hara granted a stay of proceedings and upon applying for leave to appeal the same was granted.

The application for appeal posed a number of questions among which were the following: (1) Is the Statute in question unconstitutional because it is contrary to the due process clause of the Fourteenth Amendment, Art. IV of the Michigan Constitution? (2) Was Judge O'Hara sitting as a one man grand jury under the pertinent sections of the Statute disqualified by the provisions of the Statute for citing a witness for contempt and thereafter hearing the contempt proceedings himself where the alleged contempt laws in the course of a grand jury investigation in the presence of him as a grand jury? (3) In assuming the duties of a grand jury, did Judge O'Hara continue to be vested with judicial functions and/or safe guards while acting in an administrative capacity? (4) Does the legislature have the authority to impose upon the judiciary duties that are not judicial?

On July 6, 1954, the Supreme Court affirmed the Lower Court. That the petitioner immediately filed a motion for rehearing with the Court, and was released on bail in the amount of Three Thousand ($3,000.00) Dollars, pending a decision on a motion for rehearing.

On the 8th day of September the Court denied the motion for rehearing. That following the denial of the motion for rehearing the petitioner White made application to the Supreme Court of the United States of America for leave to file a Writ of Certiorari to review the proceedings hereinbefore set forth.

ISSUES RAISED IN STATE COURT

The very question of constitutionality of the so-called one man jury was raised in both of the above referred to matters, and various motions as hereinafter set forth were made at respective stages in order to bring into focus

the constitutionality of the so-called one man grand jury act. For the sake of expediency inasmuch as the two matters were consolidated, we will hereinafter set forth the times and manners of raising the issues in the respective cases, just as is hereinbefore set forth in the Concise Statement of Facts.

In Re White

On the 18th day of May, 1954, upon the issuance of the order to show cause why the petitioner White should not be punished for criminal contempt, the petitioner did appear on the 21st day of May, 1954 as required by the order to show cause. (Record p. 50). Thereupon petitioner was called to the stand before Judge John P. O'Hara. An objection to the proceedings was entered on behalf of the petitioner White. Over objections of counsel to the petitioner being called as a witness, he was nevertheless called and examined by Judge John P. O'Hara and the Prosecutor, Joseph Rachid. (R. P. 65, 69 and 72). Again objection was interposed by counsel for the petitioner specifically on the ground that he was entitled to counsel at all times. This objection was overruled by the Court and the matter was continued. (R. P. 82). Aaign an objection was made to Judge O'Hara continuing the contempt hearing, and request was made to have same assigned to another Judge in the same court. This objection was overruled by the Court and the matter continued. The matter was continued by the Court until Friday, May 28, 1954 (Record p. 86). Again Motions to dismiss were made because under the Statute the Judge sitting as a one man grand jury could not hear contempts except in certain instances. That the one man grand jury deprived petitioner of his liberty under the due process of law clause of the 14th Amendment of the Constitution of the United States; That the one man grand jury deprived the petitioner, who was called before it to testify, of the right to have counsel, in violation of the Constitution of the United States. All of these motions were denied. (Record p. 105)

In Re Murchison

That on the 6th day of May 1,954, Judge John P. O'Hara, as a one man grand jury issued an order to show cause requiring the petitioner Murchison to show cause why he should not be punished for criminal contempt of this Court because he had testified falsely before him. (Record p. 53). In response to the order to show cause, petitioner Murchison did appear in response to the order to show cause. The motion to dismiss the entire proceedings was made at the conclusion of the hearing for the reason that respondent was denied equal protection of the law under the due process clause of the 14th Amendment of the Constitution of the United States, giving committing functionary the entire discretion as to the scope and content of the record on appeal; and further that he disqualified himself from trying the contempt proceeding and referred same to the presiding Judge. These motions were denied. (Record pp. 173-176). A motion to dismiss was again made because the act, to wit, the One Man Grand Jury Act, violates the said due process clause. (Record p. 178).

The motions to dismiss in both instances and the reasons hereinbefore set forth in both instances in effect attack the entire One Man Grand Jury system upon the basis of a separation of powers, and that all proceedings are in violation of the petitioners' rights under the due process clause of the 14th Amendment of the Constitution of the United States. Both matters, by stipulation and by order of the Supreme Court of the State of Michigan, were consolidated on June 9, 1954 (Record p. 150). The same issues raised by motions in the lower court were submitted to the Supreme Court of the State of Michigan upon appeal therefrom by way of application for leave to appeal (App. P. ...). The application for leave to appeal was filed and granted (Record p. 150) (App. P. ..). On the 15th day of June, 1954, both cases were argued in the Supreme Court of Michigan and submitted, urging the same Federal and Constitutional questions hereinbefore set forth (Record p. 151).

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

ARGUMENT

1. We here address ourselves by way of concise argument to each of the respective questions posed, urging each as a reason for the allowance of Writs of Certiorari. The question of the constitutionality of the Grand Jury Statute in Michigan has previously been before this Court but has never been expressly passed upon. In this connection we call attention to the fact that in the case of *Re Oliver*, 333 U. S. 257, 92 L Ed 682, the necessity of this Court determining the constitutionality of the Michigan Grand Jury Statute is evidenced. Mr. Justice Black, in delivering the majority opinion in this case, uses the following language:

> "The petitioner does not here challenge the constitutional power of Michigan to grant traditional inquizitory grand jury power to a single Judge, and, therefore, we do not concern ourselves with that question."

In the instant case this question of the inherent unconstitutional power of Michigan to function through a one man grand jury was raised at the threshold and carried through each step of the presentations in the courts below. The constitutionality of this one man grand jury we believe to have been effectively challenged in the above cited case by the language of Mr. Justice Rutledge in his concurring opinion:

> "Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge, and petit jury * * *.
>
> "This aggregation of powers and inherent concomitant denial of historic freedoms were unknown to the common law. * * * They are altogether at variance with our tradition and system of government. * * * They cannot stand the test of constitutionality * * * there is no semblance of due process * * *."

Even in the dissenting opinion of Mr. Justice Frankfurter in the cause above referred to, it is evident that the position of this Court is that the constitutionality of the one-man grand jury system in Michigan should be passed upon only when the issue has been properly raised in the Court below and such courts have had an adequate opportunity to pass upon same, and where the record shows what actually happened under this circumstance so that this Court might properly determine as to whether or not such procedure offends the due process clause of the 14th Amendment of the Constitution of the United States. It is respectfully urged that the instant case meets this requirement and affords such an opportunity to this Court.

2. In addressing ourselves to question Number Two (2), we face the interpretation of the functioning of a one-man grand jury by the Supreme Court of Michigan as enunciated in the instant casees. The Michigan Supreme Court presumably relied on the case, among other things, of *In Re Slattery*, 310 Mich 458, 17 NW (2d) 249, cited in People's Reply Brief to Respondent's Supplemental Brief. The quotation from that Reply Brief is:

> "So that there may be no further question, we hold that the Judge conducting the one-man grand jury proceedings is acting in a judicial capacity."

It is here urged that the Court can not at one and the same time function as a one man grand jury and reserve to itself the functioning of a Court so as to make possible the adjudicating of an individual as being in contempt of said court. In acting as a grand jury, it is acting in an administrative and or executive capacity. In acting as a court it is, by definition, acting in a judicial capacity. To combine these functions is in derogation of *Article IV of the Constitution of the State of Michigan.* (App. P. 25). Whenever the question has been presented as to whether a grand jury inquiry is a judicial one in the sense of exercising of judicial power, the courts have answered in

the negative. *State* v. *Lawler*, 221 Wis. 432, 267 N.W. 65, 105 A.L.R. 568; *Coblentz* v. *State*, 164 Md. 558, 166 A. 45. In order to determine whether a person or body functions as a court or in some other capacity, it is necessary to consider more than the character of the individual or actor. This Court has said in *Prentiss* v. *Atlantic Coast Line*, 211 U. S. 210, 53 L Ed. 150, that:

> "It is the nature of the final act that determines the nature of the previous inquiry."

A grand juror's final act is the issuance of a warrant. He determines no issues and makes no adjudication. The final action in the instant cases by which the petitioners are aggrieved is an adjudication of contempt which is unquestionably a judicial determination. It is anomalous to say that one individual can at one and the same time exercise both of these functions. This cannot be better demonstrated than by the use of the words of Mr. Justice Rutledge in *Re Oliver*, *supra*, which through repetitive, we here set forth:

> "Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury * * *.

Where, as here, there is the attempt on the part of the one-man grand jury to exercise the combined functions of a grand jury, a petty jury, a prosecutor, and of a trial judge, the denial to these petitioners of due process of law is emphasized. Even if the statutory allowance of a one-man grand jury be conceded as being constitutional, there can be no conceivable question but that the functioning as a one-man grand jury cannot be violative of the individuals' rights to due process of law as assured under the 14th Amendment of the Constitution of the United States. As to this fundamental proposition, this Court has spoken over a long period of years and without variance. *Kennard* v. *Louisiana*, 92 U. S. 480, 23 L. Ed. 478; *Hurtado* v.

California, 110 U. S. 516, 28 L. Ed. 232; *Moore* v. *Dempsey*, 261 U. S. 85, 67 L. Ed. 543.

3. The Michigan Statute having to do with the setting up of the one-man grand jury, reading in part from Section 28.944, sets forth as follows: (App. P. 19).

> "* * * Provided, That the judge conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or *from hearing any charge of contempt* under section 5 hereof * * *" (underscoring ours)

The foregoing is a part of *Public Act No. 276, 1951, State of Michigan*, effective September 28, 1951. We believe that there can be no question but that this was an attempt on the part of the State of Michigan to meet issues posed by this Court in its decision in the case of *Re Oliver*, *supra*. The Supreme Court of Michigan in interpreting the foregoing part of the statute in the instant case, in *Re White*, in the language of Judge Sharp held:

> "It follows that the legislature has no power to deprive a constitutional court, * * * of its power to punish for contempt committed in its presence * * *." (App. P. 60).

It seems to us apparent that the Michigan Supreme Court, in adopting this language, loses sight of the fact that the person here functioning and who is adjudicating persons in contempt on the theory of being a Court is the same individual whom the legislature was creating as a one-man grand jury, and whom, it apparently expressly intended, should not have these anommalous powers. This interpretation simply re-creates the possibility which apparently the Michigan Legislature desired to correct of giving such a basis for denial to persons situated as these petitioners of their constitutional rights of due process. Aside from it being a denial of due process per se, it is

certainly directly opposed to the underlying decision in *Re Oliver, supra*, and to the apparent corrective step undertaken by the Michigan Legislature.

4. The *Michigan Statute Annotated, section 28.943* (App. P. 18) sets forth in part as follows:

> "* * * Any person called before the grand jury shall at *all times* be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry *without being subject to a citation for contempt.*" (Underscoring ours).

It seems to us a distortion of language or an unjustified interpretation of unambigious language when the Supreme Court of Michigan, speaking through Judge Sharp in the *White* case, in interpreting the foregoing language, indicates that:

> "* * * A witness was entitled to have legal counsel before or after being subpoenaed and prior to his being called as a witness, or at such other times in the discretion of the grand jury * * *". (App. P. 61).

It is to be remembered that the adjudication of contempt in the *White* case was presumably not based upon any refusal on the part of White to testify but rather upon his refusal to testify without having the advantage of counsel. The language of the Statute here again is an apparent attempt to meet issues created by the decision of this Court in *Re Oliver, supra*, and to correct abuses which the one-man grand jury principle gave rise to. White, we respectfully submit, was exercising his constitutional rights assured him by the Constitution of the United States and expressly reiterated by the Michigan legislature in the language above quoted when he refused to answer questions without the privilege accorded him of having counsel to advise him. The extent to which the rights of the petitioners might be violated is demonstrated by the fact that the refusals were not categorical refusals but rather an

expression of unwillingness to be committed to propositions without the exercise of a right to which he was legally entitled. It is to be noted further in this connection that in each instance the petitioners were served with orders to show cause. The language of these orders is in and of itself significant and condemnatory of the practice engaged in by the one-man grand jury, who at one and the same time adjudicates for alleged contempt committed in his presence. There is no requirement to show cause why the petitioners, respectively, should not be adjudicated in contempt but rather that they should show cause why they should not be punished for the contempt already adjudicated. (App. pp. 58-60). This is essentially a trial in camera and expressly forbidden by the Constitution of the United States and as recently pointed out in *Re Oliver, supra.*

It cannot be reasonably argued that any distinction in this constitutional right can be made between a witness and a defendant, particularly when the so-called witness faces, as here, an adjudication of contempt and a penalty imposed. Particularly is this true where, as here, reliance is upon a statute, the language of which is clear. Where the language of a statute is plain and unambigious, there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning.

SUMMARY

It is respectfully urged that the one-man grand jury, peculiar to the State of Michigan, is, to say the least, inconsistent with the provision in any other jurisdiction of the United States, and we respectfully urge by its very creation gives rise to a situation which in normal functioning can hardly avoid the violation of the Constitutional rights of persons called before it. In the instant cases where this one-man grand jury undertakes to adjudicate respondents, petitioners here, in contempt, there is an attempted judicial functioning by this one-man grand jury which, by its very operation, violates the letter and spirit

of the law as laid down by the due process clause of the 14th Amendment of the Constitution of the United States. Whether the determination by this one-man grand jury be for an alleged contempt because he concludes that testimony before him is conflicting, or whether he decides that a contempt stems from an unwillingness of a respondent to give testimony without the advantage of the advice of counsel is not the controlling factor. The error rises, as the record in these cases will abundantly disclose, in the manifold capacities in which the one-man grand jury attempts to function and in the absolute impossibility of due process being had before an alleged Court who draws the indictment and cites respondents without any opportunity to be properly heard to show cause why one should not be punished for an alleged contempt which has already been factually decided by the Court.

It is respectfully urged by each of the petitioners that a writ of certiorari issue in the respective cases directed to the Supreme Court of the State of Michigan, requiring that these respective causes be reviewed by this Court and that the respective judgments herein of the said Supreme Court of Michigan be reversed.

And for such other and further relief as to this Court may seem proper.

COBB, HOWARD AND HAYES,
Attorneys at Law
613 F Street, N. W.

By:

JAMES A. COBB
GEORGE E. C. HAYES,
Counsel of Record for the Petitioners

Of Counsel:
WILLIAM L. COLDEN,
Attorney at Law
1308 Broadway
Detroit, Michigan

APPENDIX

Sections 28.943-28.944; Michigan Statute Annotated; Callaghan's Pocket Supplement, 92-103

§ 28.943 Proceedings before trial; investigation of suspected offenses by judge of court of record; inquiry; witnesses; participants in inquiry, disqualification from appointment or election.] SEC. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, • [or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record] shall have probable cause to suspect that any crime, offense or misdemeanor • shall have been committed within his jurisdiction • [, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry: Provided, That in any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court. Thereupon such judge shall require such persons to attend before him as witnesses and answer such questions as such judge may require concerning any violation of law about which they may be questioned within the scope of the order;] and the proceedings to summon such [witness] and to compel [him] to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall • [not receive any compensation or remuneration other than witness fees as paid witnesses] in other criminal proceedings • [, and said witness shall not be employed in any capacity by the judge or by any person connected with such inquiry, within the scope of the said inquiry being conducted.] Whenever a subpoena shall be issued by the [judge] conducting such inquiry, commanding the appearance of a witness before such [judge] forthwith upon the

service of such subpoena, and, following the service thereof, such witness arrives at the time and place stated in such subpoena, the [judge] so issuing the same shall be [forthwith] notified of such [appearance] by the officer serving the subpoena, and it shall thereupon be the duty of such [judge forthwith] to appear and take the testimony of such witness •. [Any person called before the grand jury shall at *all times* be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. All matters so revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in said section. No testimony shall be taken or given by any witness except in the presence of the judge.]

Any [judge,] prosecuting [attorney] or special prosecuting [attorney,] or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of such inquiry: Provided, That such disqualification shall not extend more than [1] year from date of termination of such inquiry, as determined by final order of said [judge] entered prior to such date. •

§ 28.944 Same; apprehension of suspected person; disqualification of investigating judge in later proceedings; removal of public officers, procedure; disclosure of information, exceptions, penalty; report of no finding of criminal guilt; limitation of period of inquiry; inability to continue inquiry, appointment of successor judge.] SEC. 4. If upon such inquiry the [judge] shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, [he] may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the [judge] having jurisdiction shall proceed with the case, matter or proceeding in like

manner as upon formal complaint: [*Provided, That the* [*judge*] *conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing* • *on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 hereof*[*, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena*] And if upon such inquiry the [judge] shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance [in] office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said [judge] shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. • [Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before such judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state,] any [judge] conducting such inquiry, any prosecuting attorney and other persons who may at the discretion of such [judge] be admitted to such inquiry, who shall while [conducting such inquiry or while]

in the services of [such judge] or after his services with [such judge] shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in any such inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or [under] recognizance, or who shall disclose that any person has been questioned or [summoned] in connection with any such inquiry, or who shall disclose or publish or cause to be published any of the proceedings of such inquiry otherwise than by issuing or executing processes prior to such indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related thereto, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than [$1,000.00] or both such fine and imprisonment in the discretion of the court, and such offense when committed by a public official shall also constitute malfeasance in office. Upon the termination of such inquiry [if] the judge shall make no presentment of crime or wrong-doing as to any person or persons whose apprehension or removal from office he has not so caused, [he] may, in his discretion, [with the consent of the person who may be named,] file with the clerk of the county in which such inquiry has been conducted, a report of no finding of criminal guilt as to any person or persons involved in such inquiry, either as witness or otherwise, whose involvement in such inquiry has become public.

[No inquiry or proceeding hereunder shall continue longer than 6 months unless extended by specific order of the said judge or his successor for an additional period not to exceed 6 months.]

In the event any [judge] conducting such inquiry shall be unable to continue therein because of physical disability, disqualification, termination of office or death, the presiding circuit judge of Michigan shall appoint a successor.

§ 28.944(1) Same; secrecy of proceedings, exceptions, penalty.] SEC. 4a. It shall be unlawful for any person, firm or corporation to possess, use, publish, or make known to any other person any testimony, exhibits or secret proceedings obtained or used in connection with any grand jury inquiry conducted prior to the effective date of this act, except in the manner specifically provided herein, and also excepting any information heretofore disclosed before any investigating committee of the Congress of the United States or any agency of the federal government. Any person violating the provisions of this section shall be guilty of a felony.

§ 28.945] Same; failure of witness to appear or answer questions; penalty. SEC. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such [judge] may require [as] material to such inquiry, shall be deemed guilty of a contempt and after a public hearing in open court and conviction of such contempt, shall be punished by a fine not exceeding [$1,000.00] or imprisonment in the county jail not exceeding [1 year] or both at the discretion of the court: Provided, That if such witness after being so sentenced shall [offer to] appear • [before such judge to purge himself of such contempt, the judge shall cause such witness to be brought before him and, after examination of such witness,] the [judge] may in [his] discretion commute or suspend the further execution of such sentence.

§ 28.945(1) Same; confidential and privileged communications.] SEC. 5a. In any inquiry authorized by this act • communications between reporters [of] newspapers or other publications and their informants • [are hereby declared to be privileged and confidential. Any communications] between attorneys and their clients, between clergymen and [the] members of their respective churches, and between physicians and their patients • [are hereby declared to be privileged and confidential when such communications were necessary to enable such attorneys, clergy-

men, or physicians to serve as such attorney, clergyman, or physician].

§ 28.946 Same: incriminating answers of witness; granting of immunity to witness, procedure, secrecy, scope.] SEC. 6. No [witness] shall upon such inquiry be required to answer any questions, [or] shall be convicted for contempt upon refusal to do so, when the answers might tend to incriminate him. [A written order granting to such witness immunity from such incrimination may be entered by said judge pursuant to a written motion by the prosecuting attorney or other duly authorized representative of the state in such proceeding, which order shall set forth verbatim the questions which such witness refused to answer. A true copy of such motion and order shall be delivered to such witness before he shall answer such questions. The order granting immunity so made shall thereafter extend to all related questions which may thereafter be put to such witness until such udge advises the witness that said immunity no longer applies. All such questions and the answers thereto shall be reduced to writing under the direction of such judge and a true copy of such transcript, duly certified by such judge, shall be delivered to such witness as soon as practicable thereafter. The provisions for secrecy provided for in section 3 hereof shall apply to all copies of such motion, order and transcript so delivered to such witness except that the witness may be privileged to disclose the same to his attorney if such witness should thereafter be prosecuted for any offense directly or indirectly growing out of any testimony given by him in such inquiry. No person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him. No such order granting immunity shall extend beyond the scope of such inquiry, nor shall it extend beyond the particular questions set forth in any such motion, order or transcript.]

§ 28.946(1) Same; sealing and filing of docket, journal, reporters' notes, transcript and other records on termination of inquiry; secrecy; availability of transcript and record to witness in subsequent proceedings; destruction of transcripts, notes and records.] SEC. 6a. On termination of any such inquiry lasting not more than 30 calendar days the docket, journal, reporters' notes, transcript and other record of such judge in such inquiry shall be sealed and filed with the clerk of the court having jurisdiction; and if lasting more than 30 calendar days shall be sealed and filed with the clerk of the supreme court of the state of Michigan, where it shall be held secretly in a separate container securely locked. Any person who shall violate the secrecy herein ordered as to such docket, journal, transcript and record shall be punished as provided in section 4 hereof. And the entire transcript and record as to any witness, and so far as material, including any grant of immunity, shall be available to such witness in connection with any appeal or other judicial proceeding where it may be relevant upon such witness filing a petition with the circuit court of the county in which he resides setting forth the proceeding for which such documents are sought and describing the portions of such transcript and record as to such witness only, which such witness requested for such appeal or proceeding; the judge of such circuit court shall issue an order upon the filing of such petition directed to the clerk of the supreme court of the state of Michigan or the clerk of the court, as the case may be, ordering such clerk to make available to such witness all such portions of the transcript and record as shall pertain to such witness and as set forth in the petition. The clerk shall immediately reseal the remaining transcript and records after compliance with such order. The petitioner shall execute to the clerk of the supreme court a receipt for such documents and such documents shall be returned to the clerk immediately upon the termination of such appeal or proceeding for which the same shall have been obtained: Pro-

vided, however, upon the petition of the prosecuting attorney of the county in which such inquiry was conducted, or any other interested person, any circuit judge, acting as such in said county, upon determining that there is no further need for preserving and retaining the same, shall enter an order providing for the referring to the supreme court, for the entry of such order or orders as a majority of the court may at any time determine, for the destruction of said transcripts, notes and records, or any part thereof: Provided further, That no such order shall be entered by such circuit judge until at least 6 years after the termination of such inquiry.

§ 28.946(2) Same; accounting of monies disbursed, filing after termination of inquiry.] SEC. 6b. Within 90 days after the termination of such inquiry, such judge shall file with the clerk of the court having jurisdiction a public accounting of all monies disbursed by him or disbursed at his direction.

ARTICLE IV OF THE MICHIGAN CONSTITUTION OF 1908 DIVISION OF THE POWERS OF GOVERNMENT

Departments of Government. SECTION 1. The powers of government are divided into three departments: The legislative, executive and judicial.

Limitations of powers of officers. SECTION 2. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

No. 79821 Miscellaneous

In the Matter of the Application of GERALD K. O'BRIEN, Prosecuting Attorney for the County of Wayne, for a Judicial Investigation into the Operations of Numbers Syndicates and the Relation of Certain Police Officers Therewith.

At a Session of said Court held in the Municipal Court Building, Detroit, Michigan, on Thursday, May 6, 1954.

PRESENT: THE HONORABLE JOHN P. O'HARA, Judge of Recorder's Court and Grand Juror.

Order to Show Cause

This court having heretofore convened in this cause in accordance with the statute in such cases made and provided, for the purpose of conducting a judicial investigation into certain crimes, offenses and misdemeanors set forth in the order of the court, it became and was a material question to this judicial inquiry whether or not certain police officers of the City of Detroit and other persons frequented or went to the residence of a known and notorious numbers operator, to-wit, one Edward Stephen, said residence being known as 945 St. Josafats Court in the City of Detroit;

That Patrolman Lee Roy Murchinson having been duly called before the court as a witness in the said judicial

inquiry on the 7th day of April, 1954, and was then and there duly sworn; that the said Patrolman Lee Roy Murchinson, contriving and intending to prevent the due course of justice, then and there as a witness in said judicial inquiry, upon his oath aforesaid, falsely, corruptly, knowingly, and wilfully, did depose and swear, among other things, in substance and to the effect as follows: that he, the said Patrolman Lee Roy Murchinson at no time in the month of March, 1954, went to the said residence of Edward Stephen, the same being 945 St. Josafats Court, that he the said Patrolman Lee Roy Murchinson at no time went to either the rear or front door at 945 St. Josafats Court; whereas, in truth and in fact the said Lee Roy Murchinson did walk to the front entrance of 945 St. Josafats Court on the 9th day of March, 1954, at approximately 8:40 A.M. and that having failed to gain entrance at the front door of said address he the said Patrolman Lee Roy Murchinson walked to the rear door where he rang the door bell.

All of which was then and there well known to the said Patrolman Lee Roy Murchinson.

It therefore appearing from the sworn testimony of Inspector Fred Heath and Lieutenant Claude Ingersoll, and the photographs taken of the said Patrolman Lee Roy Murchinson at said address on the time and date hereinabove set forth, that the said Patrolman Lee Roy Murchinson has been guilty of wilfull and corrupt perjury, which perjury has an obstructive effect upon the judicial inquiry being conducted by this court and the said Patrolman Lee Roy Murchinson obstructed the judicial function of the court by wilfully giving false answers as aforesaid, and did also tend to impair the respect for the authority of the court, all of which perjury and false answers given by the said witness aforesaid was committed during the sitting of, in the presence and view of this court and constitutes criminal contempt;

It is therefore ordered that the said Patrolman Lee Roy Murchinson appear before this court on the tenth day of May, 1954, at 10:00 o'clock in the forenoon and show cause why he should not be punished for criminal contempt of this court because of his aforesaid acts.

It is further ordered that a true copy of this order be personally served upon the said Patrolman Lee Roy Murchinson four days before the time herein prescribed for his appearance.

JOHN P. O'HARA,
Judge of the Recorder's Court

STATE OF MICHIGAN

IN THE RECORDER'S COURT FOR THE CITY OF DETROIT

No. 79821-1 Miscellaneous

In Re: Contempt Proceedings Against LEE ROY MURCHISON

Opinion of the Court

Question Involved:

Is a Judge of the Recorder's Court for the City of Detroit sitting as a Grand Juror under Sec. 28.943 M.S.A. et seq., precluded by provisions of Sec. 28.944, M.S.A. from citing a witness for contempt and hearing the contempt proceedings himself where the alleged contempt arose in the Courts of the grand jury investigation and in the presence of the Court.

FACTS

Prior to March 15, 1954, officers of the police department of the City of Detroit observed for some time activities around premises known as 945 St. Josaphats Court, Detroit, which was the home of Edward "Indian Steve" Stephen. The observations were the result of complaints made to the police department by neighbors concerning

the numerous policemen and other individuals visiting this address.

On March 15, 1954, police officers of the City of Detroit conducted a raid upon the premises under observation and arrested a number of individuals found on the premises and seized a quantity of gambling paraphernalia, mutual bet slips, tapes, and cash found in the premises.

On March 16, 1954, as a result of the developments growing out of the observations and raid on premises at 945 St. Josaphats Court, a petition by Gerald K. O'Brien, Prosecuting Attorney for the County of Wayne, was presented to the presiding judge of the Recorder's Court. A meeting of all judges of the Recorder's Court was immediately called and the petition as well as the oral presentations of the Prosecutor, Commissioner Donald S. Leonard of the Detroit police department, and other police officers, were heard by the entire Bench. After a discussion of the allegations, a vote of the judges was taken and the petition was granted, in accordance with Rule 38 of the Recorder's Court for the City of Detroit, which reads as follows:

> "Petitions for Grand Juries shall be presented to the Presiding Judge and by him submitted to the bench for a decision as to whether the petition shall be granted and a Grand Jury called. No Grand Jury shall be called except by affirmative majority action of the bench present. The Grand Juror shall be designated by a majority of the judges present at a meeting called for that purpose."

This rule is in accordance with Sec. 28.943 M.S.A., which in part reads as follows:

> "Provided, that in any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court."

John P. O'Hara, one of the judges of the Recorder's Court for the City of Detroit, was unanimously appointed

as the judge to conduct the inquiry, which by an order entered on March 16, 1954, was confined to police corruption in connection with gambling. On the following day he entered upon his duties and the investigation commenced immediately.

In the course of the investigation it became material to the inquiry to discover whether police officers had visited the Stephen premises at 945 St. Josephats Court, and on April 7, 1954, Lee Roy Murchison a Detroit policeman, was called as a witness before the Grand Juror. He was sworn to tell the truth, the whole truth and nothing but the truth. He was interrogated by Joseph G. Rashid, Assistant Prosecuting Attorney for the County of Wayne. Officer Murchison was asked how many times he had visited the premises at 945 St. Josaphats Court. He replied that he had never been there.

In response to a question as to how many times he went there in January of this year, he replied, "None". In reply to a question as to how many times in March of this year, he replied, "None". In reply to a question as to how many times he had been there this year, he replied, "I haven't been there." He also stated, "I wouldn't even know exactly where 945 St. Josephats would be." He was also asked if he saw a picture which showed how he went to the house, and rang the buzzer, if he would still deny it. He answered, "That is not correct because I haven't been there." In response to further questions he said positively he didn't go there in the month of March and further that he had never been there, and, "I didn't go there. It must be a case of mistaken identity."

Testimony under oath taken before the Grand Juror of Inspector Fred Heath and Lieutenant Claude Ingersoll, of the Detroit police department, positively identified Officer Murchison as a person observed by them on the porch of the Stephen house at 945 St. Josaphats Court on the 9th day of March, 1954, shortly after 8:40 A.M. Inspector Heath identified Lee Roy Murchison as the policeman he saw on

the porch on the day in question. He further testified he had known policeman Murchison in excess of five years, and that both of them at one time had been assigned to the Vice Bureau. Inspector Heath was shown a photograph of Officer Murchison which he identified and was also shown a picture taken by Lieutenant Claude Ingersoll on the morning of March 9, 1954, showing Officer Murchison standing on the porch of the Stephen residence at 945 St. Josaphats Court. Inspector Heath identified Officer Murchison as the man in the picture taken by Lieutenant Ingersoll.

Lieutenant Claude Ingersoll, of the Detroit police department was also sworn as a witness. He testified he and Inspector Heath had previously been observing what occurred at the Stephen premises and that on the morning of March 9, 1954, about 8:40 A.M., he saw Officer Murchison walk east on St. Josaphats, go to the gate, walk up on the porch of 945 St. Josaphats, and ring the front door bell. He stated that he remained on the porch for possibly two minutes, then walked to the rear of the house where he again pushed the buzzer. He remained there for about two minutes, then walked between the houses to the street where he walked west on St. Josaphats towards Hastings Street. Lieutenant Ingersoll stated that he had known Officer Murchison since 1944 or 1945, about ten years or longer, and that he had been assigned to the 13th Precinct Station where Officer Murchison worked. Lieutenant Ingersoll also testified that he took pictures with a movie camera of Officer Murchison standing on the front porch of the Stephen residence, several of which pictures were introduced into evidence and identified as Officer Marchison.

Thereafter on Thursday, May 6, 1954, Officer Lee Roy Murchison was served in court with an Order to Show Cause on Monday, May 10, 1954, before the Grand Juror why he should not be adjudged guilty of contempt of court for falsely testifying to material facts before the court. On that day, Officer Murchison appeared together with James Jackson, who entered an appearance as Officer Murchison's attorney.

Mr. Jackson objected to the proceedings for the reason that the Grand Jury had no authority to hear contempt proceedings of the nature charged in the Order to Show Cause in view of the provisions of Sec. 28.944 M.S.A. The objection was overruled, and the court proceeded to take testimony.

The witnesses were all interrogated by Joseph G. Rashid, Assistant Prosecuting Attorney for Wayne County in open court.

Bernice Gough, the court reporter who took the previous testimony of Officer Murchison, was sworn as a witness and testified to what had been stated by Officer Murchison with respect to his presence at the Stephen premises on March 9, 1954, and to the denial of Officer Murchison that he had ever been at the Stephen premises on March 9, 1954, or at any other time. Inspector Fred Heath and Lieutenant Claude Ingersoll, were also sworn and they gave testimony of their personal acquaintanceship and knowledge of Officer Murchison and his presence at the Stephen premises on March 9, 1954. Lieutenant Ingersoll also identified the photographs of Officer Murchison taken by him on March 9, 1954.

James Jackson, cross examined witnesses Gough, Heath, and Ingersoll at length. At the close of the testimony on May 10, 1954, Mr. Jackson stated that he would produce witnesses from Shrewsbury, Canada, to prove Officer Murchison was at that place on March 9, 1954. The hearing was adjourned from May 10, 1954, to May 12, 1954, to give Mr. Jackson an opportunity to present testimony on behalf of his client. On May 12, 1954, when court convened on the matter again, Mr. Jackson offered various objections to the proceedings and stated that he did not desire to offer any testimony on behalf of Officer Murchison.

Mr. Jackson was asked by the court whether he wished to present any legal argument in support of his contentions. No brief was filed on behalf of respondent Mur-

chison by Mr. Jackson and no legal argument beyond quoting the statute, Sec. 28.944 M.S.A., was presented to the court.

The contempt hearings on May 10, 1954, and May 12, 1954, were held in open court. The front door of the courtroom was opened wide so that any person desiring to enter could do so. At various times during the hearings, many attorneys and other persons were present in the courtroom, including representatives of the press.

The matter was then adjourned to Friday, May 14th, at 11:00 o'clock A.M.

Law

In approaching the legal aspects of this matter it is first necessary to determine what the nature of a Judge of the Recorder's Court, sitting as a Grand Juror, is. In what capacity does he sit; as a creature of Grand Jury law, or as a judicial personage already in existence, clothed with judicial powers? If such a Judge does undertake a Grand Jury hearing as an existing judicial body, and not as a creature of Grand Jury legislation, then the next question is what powers with respect to contempts does an existing Judge of the Recorder's Court possess?

Question Number I: Is a Grand Juror a Special Creation of the Legislature, or Is He a Judicial Person to Whom An Investigation Is Assigned by Law?

This question has been raised many times, and it is now clear that a Judge acting as a Grand Juror functions judicially, that he is a Judge in the fullest concept of the word, and not just an "inquisitor", as has been argued before, or merely an instrumentality for the detection of crime.

It is hardly necessary to go beyond one decision of this court which answers the question as fully and completely as could be desired. That is *In Re Slattery, 310 Mich. 458.* A perusal of the record and briefs filed in this matter

discloses that the character of a Grand Juror was as completely discussed and argued as in any matter where the question has arisen before the court. The voluminous briefs filed by the Respondent's attorneys and by amici curiae dealt with the question extensively, and persistently repeated that the Grand Juror was only an inquisitor. The Court said (P. 465):

> "The statutes of this state invoked in the instant case serve the same purpose as the constitutional provisions in regard to grand juries in other jurisdictions. They do not impose non-judicial duties upon the judiciary, and are in strict conformity with the Constitution of this state (1908) which in Article VII, under the heading 'judicial department' makes due provision in regard to the judicial power. In Article VII, Section 18, under the heading 'conservator of the peace' it is stated that justices of the Supreme Court, circuit judges and justices of the peace shall be conservators of the peace within their respective jurisdictions. * * *"

Quoting from *Averill* v. *Parrott, 74 Mich. 296,* the court said:

> "As such conservators, they had, when the Constitution took effect the authority to apprehend offenders against the criminal laws of the state, and to hold examinations, and commit, bind over, or hold to bail, as well as other authority exercised by conservators of the peace."

The Supreme Court said (P. 466):

> The one man grand jury proceedings, in accordance with law, were instituted in the Circuit Court for the County of Ingham. When a complaint had been filed by the attorney general it became incumbent upon the judge "as a circuit judge to make an investigation. He was neither a prosecuting attorney, policeman, or detective. He had judicial duties to perform, and he proceeded in a judicial capacity. In order to dispel any doubt as to the finding of petitioner guilty of contempt, he proceeded to act as a circuit judge in regard to

proceedings which he himself had conducted while acting as a one man grand jury."

The Court then cited twelve of its prior decisions in which the same question had been presented, and concluding, said, on page 467:

"So that there may be no further question, we hold that the judge conducting a one man grand jury proceeding is acting in a judicial capacity."

The foregoing sentence should put at rest this question in the State of Michigan. It is interesting to note that a Writ of Certiorari in the Slattery matter was denied by the Supreme Court of the United States, *325 U. S. 876; 89 L. Ed. 1939.*

Question Number II: What Are the Judicial Powers Possessed by Judges of the Recorder's Court?

The Superior Court of Detroit, hereinafter referred to was established in 1873. The Recorder's Court of the City of Detroit was created by the Charter of the City of Detroit in accordance with *Act No. 55, Chapter 6, of 1857.* It was continued by *Act 326, Local Acts, 1883, Section 11 of the 1883 Act, being Section 27.3561 M.S.A.* "Jurisdiction" reads as follows:

"The said recorder's court shall have original and exclusive jurisdiction of all prosecutions and proceedings in behalf of the people of this state, for crimes, misdemeanors, and offenses arising under the laws of this state, and committed within the corporate limits of the city of Detroit, except in cases cognizable by the police court of the city of Detroit, or by the justices of the peace of said city; and shall have power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, *and to do all acts which the circuit courts of this state within their respective*

jurisdictions may, in like cases, issue and do by the laws of this state." (Emphasis supplied)

By Act 369 of the Public Acts of 1919 the powers of the Recorder's Court were supplemented and extended after referendum approval by the voters of the City of Detroit.

Under the Recorder's Court Act of 1883 jurisdiction was given to the Recorder's Court "to do all acts which circuit courts of this state within their respective jurisdictions may, in like cases, issue and do by the laws of this state."

The inherent power of Circuit Courts to cite and punish for contempts without interference from or dictation by the Legislature was established in *Langdon* v. *Wayne Circuit Judge*, 76 Mich. 358. The case involved the question whether a Circuit Judge could punish for contempt an act which was not included in the statutes then existing covering contempts. It was necessary to determine precisely whether a Circuit Court possessed inherent powers or whether those powers could be given by and taken away by the Legislature. The Supreme Court said (P. 367):

"The question of the jurisdiction of the circuit court for the county of Wayne to entertain the proceedings at all is the only one involved here.

"Jurisdiction, when applied to courts, is the power to hear and determine a cause or matter. *Courts of record in this State have inherent power to hear and determine all contempts of court which the superior courts of England had at the common law; and the statute has not undertaken to limit or prohibit their jurisdiction in the matter of contempts.* The statutes are in affirmation of the common-law power of courts to punish for contempts, and, while not attempting to curtail the power, they have regulated the mode of proceeding and prescribed what punishment may be inflicted.

"The statutes have dealt with the subject of contempts in two separate chapters. These were first

enacted in their present shape in the revision of 1846, and have "remained unchanged until the present time." (Emphasis supplied)

The Court also said (P. 371):

> "But does it follow that the court has no jurisdiction to punish, as for a contempt of court, a person who has interfered while the suit is pending, and endeavored to bring about a disagreement of the jury by bribery? Can it be said that such conduct is not calculated to defeat, impair, impede, or prejudice the rights or remedy of the party? The jurisdiction of the court does not depend upon the fact that the misconduct did actually produce such results. If the purpose was, by adaptation of the means to the end, to bring about a disagreement of the jury, such conduct was calculated to defeat or impair the rights and remedies of the party to the suit."

The inherent right of the court to punish for contempt was upheld.

The question as to the rights and powers of the Recorder's Court with respect to contempts is fully answered in *Nichols* v. *Judge of Superior Court of Grand Rapids, 130 Mich. 187.* An attorney was cited for contempt of court. A Writ of Prohibition was asked of the Supreme Court to avoid the proceedings for the reason the Superior Court had no jurisdiction of contempts. The Court went into the matter thoroughly. The Superior Court of Grand Rapids was established by the Legislature. It was not a constitutional court, one created by the Constitution itself. The Superior Court, like the Recorder's Court, was given power "to do all acts which the circuit courts of this state within their respective jurisdictions may, in like cases, issue and do by the laws of the State of Michigan." Since this language gave the powers of a Circuit Court, a Constitutional court, the Supreme Court inquired into the powers of the Circuit Court. On page 192 it said:

"The power to punish for contempt is essential to the due administration of the law, and to carry out the orders, decrees, and judgments of the court. * * *

"It follows that if the circuit courts are clothed with the power to punish for contempts, and are not limited to the cases provided for in the statute, which was enacted under the Constitution of 1835, then the respondent possesses the same power. The question, therefore, is again presented to this court, Have the circuit courts of this State the inherent power to punish for contempts, or are they subject to the control of the legislature? The question is an important one in the administration of the law. If the legislature can determine what acts shall constitute contempts in the circuit courts, it can abolish the power of such courts to punish for contempts. There is no middle ground; either the courts have the absolute control, under the Constitution, over contempt proceedings, or they have only such as the legislature may see fit to confer.

"The language of this court in *Langdon* v. *Wayne Circuit Judges*, 76 Mich., 367 (43 N.W. 310) is a broad statement that this power is inherent in the circuit courts of this State to the full extent that it existed in the courts of England at the common law. This was an authoritative statement of the law, but seems not to have been so considered by the entire profession. The subject was again before the court in *Re Chadwick*, 109 Mich. 588 (67 N.W. 1070). We there cited many authorities from other courts holding the same view that was expressed in the *Langdon* case. We will not cite those authorities again, but content ourselves with this reference to them and with the citation of a few others."

The Supreme Court cited *Bradley* v. *State*, 111 GA 168, and quoted the following:

"Where a court is established by the constitution, it is given all the powers usually possessed by all courts; and we will not construe another provision of the constitution so as to take away from the court a power which is essential to its preservation, and to its accomplishment of the purposes for which it

is created, unless constrained to do so by express words or necessary implication."

"The power to punish for contempts is as ancient as the courts, and antedates Magna Charta. Chief Justice Wilmot, nearly a century and a half ago, said of this power:

" 'The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution. It is necessary incident to every court of justice, whether of record or not, to fine and imprison for contempt acted in the face of the court; and in Westminster Hall for contempts out of court stands on the same immemorial usage which supports the whole fabrice of the common law. It is as much the lex terrae and within the exception of Magna Charta, as the issuing of any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges of its introduction, but can find none. It is as ancient as any other part of the common law. There is no priority or posterity to be found about it. It cannot, therefore, be said to invade the common law. It acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society.' "

The conclusion of the court in the Nichols case was that the Superior Court of Grand Rapids, even though a legislative court, possessed all of the powers of a circuit court, a constitutional court, to punish for contempt.

The Recorder's Court of the City of Detroit possesses the same powers that the Superior Court of Grand Rapids does. It has every power which circuit courts have to punish for contempt. Therefore, when the Legislature, in enacting the One Man Grand Jury law, provided for a Judge of a court of record to act as a Grand Juror, it gave such right to a court already in possession of plenary powers to punish for contempt. The Recorder's Court now has the same complete power to punish for contempt as was and is possessed by the Circuit Court for the County of Wayne.

Question Number III: Could and Did the Legislature Deprive Courts of Record of Their Inherent Powers to Punish for Contempt When a Restriction Upon Such Power was Attempted in Section 28.944 M. S. A.?

Section 28.944 M.S.A. provides in part:

> "that the Judge conducting the inquiry under *Section 4* of this Act shall be disqualified from * * * hearing any charge of contempt under Section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Section 5, being *Section 28.945 M.S.A.* reads as follows:

> "Same; failure of witness to appear or answer questions; penalty. Sec. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such judge may require as material to such inquiry shall be deemed guilty of a contempt and after a public hearing in open court and conviction of such contempt, shall be punished by a fine not exceeding $1,000.00 or imprisonment in the county jail not exceeding 1 year or both at the discretion of the court: Provided That if "such witness after being so sentenced shall offer to appear before such judge to purge himself of such contempt, the judge shall cause such witness to be brought before him and, after examination of such witness, the judge may in his discretion commute or suspend the further execution of such sentence."

In Michigan it has been held repeatedly from early days that the right to punish for criminal contempt is one possessed by the court independent of statute. It was said in re Dingley, 182 Mich. 50:

> "The right of the court to punish as for a criminal contempt an offender is no longer an open question in this state. The power is conferred by statute (1 Comp. Laws, Sec. 1098; 5 How. Stat. (2d. Ed.) Sec. 12589). The courts possess the power independent of the statute. Langdon v. Wayne Circuit Judges, 76 Mich. 358

43 N.W. 310); In re Chadwick, 109 Mich. 588 (67 N.W. 1071); Nichols v. Judge of Superior Court, 130 Mich. 187 (89 N.W. 691), and the many authorities therein cited. These cases are also authority for the proposition that the issue is one for the court and not one for a jury."

In People v. Doe, 226 Mich. 5, it is said at page 19:

"The objection to the power to punish for contempt is in part answered by Mundy v. McDonald, supra, but it is further insisted that the act in question makes provisions for punishment for contempt in certain cases and it is urged that this is to the exclusion of the power to punish in any other cases. The power to punish for contempt is inherent in the court. It is a part of the judicial power. It is as firmly vested in the constitutional courts by the Constitution as is the exercise of any other judicial power. *That the exercise of judicial power and all of it can not be taken away from constitutional courts by the legislature is settled.*" (Emphasis supplied)

In Cobb v. State, 200 S.E. 796 (Ga), 121 A.L.R. 210, the court said beginning on Page 213:

"The power to punish contempts is inherent in every court of record. If the court is created by the constitution, the legislature cannot, without express constitutional authority, define what are contempts, and declare that the court shall have jurisdiction over no acts except those specified. 2. The provisions of the constitution which declares that 'the power of the courts to punish for contempts shall be limited by legislative acts' does not confer such authority, but only the power to prescribe the punishment after conviction. Consequently, Section 4046 of the Civil Code, in so far as it seeks to limit the jurisdiction of a constitutional court to punish contempts to certain specified acts, is not binding upon such courts. They may go by beyond the provisions of the statute, in order to preserve and enforce their constitutional powers, by treating as contempts, acts which clearly invade them."

Then it is interesting to note that Cobb v. State approves a similar holding in Bradley v. State 111 Ga. 168, which was cited by the Supreme Court to support its similar holding in Nichols v. Superior Court of Grand Rapids, 130 Mich. 187.

The Cobb case is followed by an annotation on the power to punish for contempt. On Page 216 under "Legislative Power Denied," it is said:

> "Without attempting to cite all of the decisions in which the general declaration has been made that the power to punish for contempt is inherent in a court and exists independent of statute, it may be stated that from the cases so holding the general rule follows that the legislature cannot abridge or destroy the judicial power to punish for contempt, since a power which the legislature does not give, it cannot take away."

The foregoing is followed by numerous citations, including Chadwick 109 Mich. 588.

There being no doubt about the inability of the legislature to deprive a constitutional court of its power to punish for contempt, it follows that the provisions of Sec. 28.944, which restrict courts of record, including constitutional circuit courts, in their power to punish for contempts must be void. Since it is void as to circuit courts of record, it is void in its entirety and that includes its application to the Recorder's Court.

This is clearly illustrated in Campau v. The City of Detroit, 14 Mich. 275. Judge Cooley wrote on Page 285:

> "A single section of the act of 1865 attempts to amend all three of these; and we know of no principle which would warrant us in selecting out portions of the section to stand unaffected by the constitutional infirmity of the remainder, when all parts relate to the same subject matter, and provide the successive steps to be taken in perfecting a single proceeding. See Quinlon v. Rogers, 12 Mich. 168; Groesbeck v. Seeley, 13 ID., 329."

Again, in Hunt v. Wayne Circuit Judge, 142 Mich. 93, the supreme court was called upon to decide the constitutionality of the juvenile court act of 1905. The act extended the jurisdiction of circuit court commissioners for certain counties beyond the powers of a circuit judge at chambers as limited by the constitution. This portion of the act was palpably unconstitutional and void. The court said:

> "Satisfied of the legislative intent and purpose, can it be held that it may be disregarded, the provisions evidencing this intent eliminated, and the statute held to be for any purpose generally operative? It seems to me that every consideration forbids such a ruling. Unless the act can be held to be inoperative in counties where jurisdiction is given to probate courts and to circuit courts, it is unnecessary to discuss further the questions presented. We are obliged to say that the language of the act indicates, not only the purpose to provide for a uniform administration of the law, but for its general application in all territory not expressly excepted from its operation. Judicial power does not extend to the mutilation or amendment of the act necessary to give it any effect in any county."

The Recorder's Court Was Created by a Vote of Two-Thirds of the Members Elected to Each House of the Legislature as Required by the Constitution. The Power to Punish for Contempt Was Given in the Act. Can This Power Be Rescinded Except by a Like Two-Thirds Legislative Vote?

The Recorder's Court has been established under the provisions of Section 1 of Article 7 of the Michigan Constitution of 1908, which reads as follows:

> "Judicial power. Section 1. The judicial power shall be vested in one supreme court, circuit courts, probate courts, justices of the peace and such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general law, by a two-thirds vote of the members elected to each house."

The present Recorder's Court operating under the Recorder's Court Act of 1883 supplemented by the Municipal Court Act No. 369 of 1919, was authorized by a two-thirds vote of the members elected to each house of the legislature. The Recorder's Court continued to possess all powers given to circuit courts in the State of Michigan as outlined hereinbefore. To amend or repeal the Recorder's Court Act or the Municipal Court Act would require the same vote which was necessary for their creation. No such action has ever been taken by the legislature and consequently the Recorder's Court possesses to the fullest extent the same powers as a constitutional circuit court has with respect to contempt proceedings. If those powers may be abrogated, it stands to reason it cannot be done by inserting a provision in the law, which requires a vote of a majority of a quorum of the legislature. Powers which are so precious and inherent in the administration of courts should not be destroyed or frittered away except by action equal in numerical voting requirements to that by which such powers were created.

This identical question has been before the Supreme Court of this state several times.

In Stockdale v. School District, 47 Mich. 226, a question of validity of school bonds was involved. One question was whether the school district possessed the power to take the rescinding action in question except by a two-thirds vote which was required to create the issue. The court said at page 228:

> "We think the moderator was correct in holding that a mere majority could not rescind the vote which had been required to be taken by a two-thirds vote, and had been so taken. The decree must therefore be reversed and a new decree entered, restricted as above indicated."

In Whitney v. Village of Hudson, 69 Mich. 189, the court again had before it the question of whether a city charter requiring a two-thirds vote of the members of the

common council to pass a resolution also required a two-thirds vote to reconsider or rescind the prior action. On Page 203 the Supreme Court, holding that the number required to rescind was exactly the same as the number required to pass an ordinance said:

> "It is claimed, also, by the defendants' counsel, that the vote to reconsider was not carried; that where, by statute, a vote of two-thirds is required to pass a resolution, it cannot be reconsidered or rescinded except by a two-thirds vote This was declared to be the law in the case of Stockdale v. School District, 47 Mich. 226 (10 N.W. Rep. 349), where the motion was to rescind. And, where the body has adopted no rule regulating the practice upon motions for reconsideration, it is not perceived why the same ruling should not apply.
>
> "The law requires a vote of two-thirds of the members of the body to pass the act in the shape it is in when the vote is taken. Two-thirds are satisfied with it as it then reads, and no reason exists why a majority less than two-thirds can bring the resolution again before the body for the purpose of changing its features, or postponing action. There should be some stability in legislative action which is passed under the requirements of a law calling for a vote of two-thirds of its members, and it should remain as the two-thirds have passed it, unless the same number desire a further consideration of the measure."

The same question was again before the Supreme Court in Naegely v. City of Saginaw, 213 Mich. 460. The court upheld its previous decisions, saying on Page 538:

> "Under the provisions of Section 6, tit. 3, of the charter, the resolutions authorizing the issue of bonds required a majority vote of all the members elect of the council. A corporate act which can only be taken by a majority vote of all the aldermen elect could not be rescinded except by a like vote. Stockdale v. School-District, 47 Mich. 226; Whitney v. Village of Hudson, 69 Id. 189, 202. The resolution offered by Ald. Smith received but 14 votes, and did not prevail. It is un-

> necessary, therefore, to consider the veto power of the mayor, or the validity of the action taken at the special meeting held January 31."

The same question again had the attention of the supreme court in City of Saginaw v. Consumers Power Company, 213 Mich. 460. The court said at Page 469:

> "We agree with counsel for the power company that an ordinance may not be repealed or amended without action of equal dignity to that required in its enactment. Chicago, etc., R. C. v. City of Chicago, 174 Ill. 439 (51 N.E. 596); 2 Dillon on Municipal Corporations (5th Ed.) Sec. 571."

In contending that the general, inherent, constitutional power possessed by the Recorder's Court to punish for contempts was restricted by the provisions of Sec. 28.944 M.S.A., it must be argued that the repeal is strictly one by implication. Aside from the fact that any such restriction or repeal would necessarily have to be accomplished by a two-thirds vote of both houses of the legislature elect, is it possible to accomplish such a repeal or restriction by implication only?

The Supreme Court had the question of repeal by implication before it in In Re Simmons, 248 Mich. 298. This case involved a contempt proceeding in the Recorder's Court. The precise question was whether the power to punish for contempt previously possessed by the court had been taken away by an implied repeal. Answering in the negative, the Supreme Court on page 301 said:

> "Defendant challenges the jurisdiction of the court, in that the acts charged as contempt, 'not being within the immediate view and presence of the court and directly tending to interrupt its proceedings, or to impair the respect due to its authority,' are not within the statute, 3 Comp. Laws 1915, Sec. 12268, defining contempts punishable by courts of record.
>
> "This statute is part of the judicature act (No. 314) of 1915. With only slight changes of language, it is

substantially a merger and re-enactment of two former statutes of long standing (2 Comp. Laws 1857, Sec. 4053, 4074), the criminal contempt parts of which were not designed to limit or prohibit jurisdiction but were in affirmation of the common law inherent power of courts of record. *Langdon* v. *Wayne Circuit Judges*, 76 Mich. 358. The Recorder's Court of the city of Detroit was re-established by Act No. 326, Local Acts 1883 (3 Comp. Laws 1951, Sec. 14633 et seq.). It has original and exclusive jurisdiction over certain criminal offenses committed within the corporate limits of the city, and supplants the circuit court of the county in that respect and territory. To exercise such jurisdiction, it was given the general powers of the circuit court. This included the jurisdiction in contempt possessed by the circuit court, inherent as well as statutory. *Nichols* v. *Judge of Superior Court of Grand Rapids*, 130 Mich. 187.

"Defendant, however, contends that the judicature act, being subsequent to the recorder's court act, impliedly repeals the general grant of powers in the latter as far as it applies to contempt. His position is untenable on several counts. Repeals by implication are not favored. 'Only when two acts are so incompatible that both cannot stand does the latter repeal the former'. *Highland Park* v. *McAlpine*, 117 Mich. 666. There is no such incompatibility between the acts under consideration. The recorder's court act was intermediate the original and present contempt statutes. As the latter was merely a re-enactment of the former, the recorder's court act maintains its position of qualifying the latter as it did the former. 36 Cyc. p. 1084. The judicature act was a revision of the practice. Where there is an express repealing clause in a revision, only enumerated acts are repealed unlss other legislative intent clearly appears. 36 Cyc. pp 1081, 1082. The judicature act attempted no wholesale repeal or abrogation by general language, but carefully and specifically set up the particular statutes repealed by it. Neither the recorder's court act nor any part of it is listed in the repealing clause of the judicature act. The power of the recorder's court to punish for contempt in the exercise of its criminal

jurisdiction is as necessary as that of the circuit court. The indices are that the legislature intended to leave that power intact. The court had jurisdiction."

The foregoing quotations of law clearly demonstrate that the powers given by statute to the Recorder's Court by a two-thirds vote of each house elect, cannot be withdrawn from the Recorder's Court except by a like two-thirds vote of all elect. In addition, those who argue that Sec. 28.944 M.S.A. does rescind previous necessary and essential powers of the Recorder's Court, must rely upon repeal by implication only to support their argument. On the basis of both phases of this argument, the original contempt powers of the court have been left in their previous condition unrestricted and unrescinded by the provisions of Section 28.944 M.S.A.

Even if Sections 28.944 and .945 are Valid and Binding on the Recorder's Court, They Do Not Apply to This Contempt.

Section 5 of the Grand Jury Act, being Sec. 28.945, provides that "any witness neglecting or refusing to appear in response to such summons or to answer any questions which such judge may require as material to such inquiry, shall be deemed guilty of contempt, * * *" The particular contempt with which the respondent in this matter is charged is not a refusal to answer questions but falsification of testimony in the presence of the court. This court through its inherent powers can punish such contempt. The language of the Section can have no application to the type of contempt involved in this proceeding.

Conclusion

Because the Recorder's Court has all the powers of a constitutional court to punish for contempt, and because the Recorder's Court possessed those powers when the Grand Juror was appointed, and because the Grand

Juror acts in a judicial capacity and in this contempt hearing herein did sit and act as in a judicial capacity, and because the Recorder's Court created by a two-thirds vote of each house of the legislature has been given powers inherent in constitutional courts, which powers have never in any manner been impaired, the holding of this court is that it has power to punish Lee Roy Murchison for giving false testimony before the Grand Jury. In addition to the foregoing facts, it is held that the portions of Sec. 28.944 M.S.A. which purport to deprive the court of power to try certain contempts are void, because they constitute an undue interference on the part of the legislature with the inherent power of constitutional courts to punish for contempt, which constitutional power is possessed by the Recorder's Court in like manner as constitutional circuit courts.

It is therefore held that this court has full power to cite, try and punish Lee Roy Murchison for contempt of court in giving false testimony before the Grand Juror.

JOHN P. O'HARA,
Judge of the Recorder's Court

[Filed July 6, 1954]

STATE OF MICHIGAN

SUPREME COURT

In the Matter of the Appeal of LEE ROY MURCHISON, for Contempt.

Before the Entire Bench

BOYLES, *J.*

This case is companion to *In re White*, heard herewith, both cases being appeals from sentences for contempt, on leave granted by this Court. The record here, by stipulation, consists of the application for leave to appeal, briefs,

exhibits and testimony filed here on which leave to appeal was granted. The cases mainly involve the same questions and were argued and submitted together.

Both appellants claim that Judge O'Hara, of the recorder's court, did not have the power to hear and punish for a contempt committed before him as a grand juror. That claim has been answered by the decision in the White Case, this day handed down, adversely to this appellant's contention, which now controls here.

In this case, Murchison claims that false swearing before the grand jury is not a contempt of court which can be punished as such; and that the record here does not factually support the finding that appellant swore falsely in the grand jury.

In the companion case, White was found guilty of contempt on the ground that he had refused to answer any questions before the grand juror unless his attorney was present, which demand was denied by the grand juror. In the instant case, as in the White Case, Murchison was cited to appear in recorder's court before Recorder's Judge O'Hara, the grand juror, to answer why he should not be punished for contempt in the grand jury proceeding. A hearing was held thereon in open court, after due notice, and testimony was taken. Murchison was found guilty of contempt, upon a finding that he had testified falsely before the grand jury, based upon testimony taken at said hearing. The court reporter who had taken the testimony of Murchison in the grand jury was sworn and testified in open court before Judge O'Hara on the hearing of Murchison for contempt. In the grand jury, Murchison, a policeman, had been sworn and had testified regarding the location of 945 St. Josaphats Court, and when asked how many times he had been there said none. He was asked whether he knew that 945 St. Josephats Court had been under observation for months by the police department as a headquarters for gambling, and answered, "I didn't know, because I am never down that way." In answer to the question how

many times he had gone there in January, 1954, he answered, "None," and the same answer as to having been there in March. When asked whether he denied that he was there at any time that year, he answered, "I haven't been there." He further testified that he wouldn't even know exactly where 945 St. Josaphats would be, that if they had a picture of him there it couldn't be he, and denied repeatedly that he had ever been at that place.

The testimony in the hearing for contempt was squarely to the contrary. Said place was known as a place which a so-called numbers syndicate was occupying as headquarters for conducting gambling. It was material in the grand jury proceedings to investigate whether Murchison knew of this place, was familiar with it and its use as the headquarters of a gambling syndicate; and to show any connection between the gambling syndicate and police officers. An inspector of the Detroit police department testified in the contempt proceedings that shortly after 8:40 a.m. on a certain morning in March, 1954, in company with a lieutenant of the police force, he saw Murchison at the above place. He identified Murchison, whom he had known for more than 5 years, both having been assigned to the same bureau in the police department. He further testified that a police lieutenant was there with him on said occasion and took pictures of Murchison while Murchison was on the front porch of 945 St. Josaphats. The police lieutenant testified that he took moving pictures of Murchison on that occasion and at the above place; that he had been assigned to make observations of 945 St. Josaphats Court, that he had known Murchison at least 10 years, and that he saw Murchison on that date at 945 St. Josaphats at about 8:40 a.m. He testified:

> "A. When I first saw him, he was walking east on St. Josaphats. He came to the gate, to the entrance of 945 St. Josaphats, walked up on the front porch and rang the doorbell of 945 St. Josaphats. * * * He remained on the front porch for possibly 2 minutes, and then turned and went down off the porch, walked be-

tween the houses to the rear entrance of 945 St. Josaphants, where he again pushed the buzzer. He remained there for probably about a minute and a half or 2 minutes, and turned around and walked between the houses again, to the street, where he walked west on St. Josaphats towards Hastings street out of sight. * * * I took some pictures as Patrolman Murchison stood on the front porch of 945 St. Josaphats, and then after he had come from the rear of the house and started to walk west on St. Josaphats, I took some more pictures. * * *

"Q. I will show you proposed exhibit 1, witness, and ask you whether or not that is a photograph of the identical likeness of the identical structure which you observed at that time?

"A. Yes, it is.

"Q. And is the photograph of the human subject there identical with that of anyone known to you?

"A. It is.

"Q. And who?

"A. Patrolman Lee Roy Murchison. * * *

"Q. All right. Now, I am going to show you proposed exhibit 1-A consisting of 11 photographs, and ask you the same questions with respect to them, namely, are they photographs of the physical structure at 945 St. Josaphats where you observed Lee Roy Murchison?

"A. They are.

"Q. And do you recognize the human being subject in the photograph?

"A. I do.

"Q. And who is that?

"A. Patrolman Lee Roy Murchison.

"Q. All right. And was Lee Roy Murchison in that position and at that point as observed in those photographs when you took them of him?

"A. He was."

The testimony leaves no doubt but that Murchison's testimony before the grand jury was deliberately and knowingly false. The testimony at the contempt hearing justified the finding of the recorder's court judge that Murchison had testified falsely in the grand jury.

Murchison made no claim of immunity during his testimony in the grand jury on the ground of constitutional immunity. The constitutional issue that he could not be compelled to answer without a waiver of prosecution is not involved here. He testified freely in the grand jury, and obviously falsely. Under the circumstances of this case, and the procedure followed, where a witness has been proven to have deliberately, knowingly and falsely testified before th grand jury as to facts material to the investigation there in progress, may he be sentenced for contempt; or must the judge leave the matter to a prosecution for perjury?

Doubless there are situations where such acts might be both perjury and contempt. In this case, it was proper to hold Murchison in contempt.

> "The fact that perjury is a crime for which one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject matter of a punishment for contempt; the one act constituting two offenses, one against the State and the other against the court." *In re* Slattery (syllabus), 310 Mich. 458.

See, also, the prevailing opinion by Justice Fellows in People v. Doe, 226 Mich. 5, 11.

Conviction and sentence affirmed.

HENRY M. BUTZEL,
LELAND W. CARR,
GEORGE E. BUSHNELL,
EDWARD M. SHARPE,
JOHN R. DETHMERS,
HARRY F. KELLY,
Concurred with BOYLES, *J.*

NEIL E. REID,
Concurred in result

[Filed July 6, 1954]

STATE OF MICHIGAN

SUPREME COURT

In re WHITE

Before the Entire Bench.

SHARPE, *J.*

On March 16, 1954, Judge John P. O'Hara, one of the judges of the recorder's court for the city of Detroit, was selected and appointed to conduct a one-man grand jury to investigate police corruption in connection with gambling. On the following day he entered upon his duties, and the investigation commenced immediately.

In the course of the investigation, respondent, John White, was subpoenaed to testify before the grand jury on May 21, 1954 It was believed that John White possessed information regarding police corruption that would assist the grand jury in its investigation. John White was sworn as a witness and the following occurred:

"By Mr. Rashid:

"Q. Your name, witness?

"A. John J. White.

"Q. Do you have any other names or nicknames, are you known by anything else?

"A. I respectfully refuse to answer any and all questions hereafter unless my attorney is present with me here in the court from the beginning until the end.

"The Court: Your request to have your attorney here in the court room from the beginning to the end is denied, Mr. White.

"If there are any questions upon which you feel that you need the advice of your counsel, and it is done reasonably and not in such a way as to cause delays, you will be permitted to go out and talk to your attorney, but your attorney will not be permitted to be present in the court room.

"A. I still think I have that right, and I still respectfully refuse to answer any and all questions.

"* * *

"The Court: Mr. White, you have been asked where do you live. Would you answer the question?

"A. I refuse to answer.

"* * *

"Q. * * * How long have you lived in Detroit?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Do you drive an automobile?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. What is your business?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Do you have an interest in or do you own the Gotham Hotel?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Are you married?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Do you have a family?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Do you have an attorney?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Who is your attorney?

"A. I refuse to answer unless my attorney is here with me at all times.

"Q. Do you have a father or mother or both?

"A. I refuse to answer unless my attorney is here in court with me at all times.

"Q. Do you have any children?

"A. I refuse to answer unless my attorney is here with me at all times, from the beginning to the end.

"Q. Do you own any real estate?

"A. I refuse to answer unless my attorney is here with me at all times, from the beginning to the end.

Other questions of like import were asked of the witness and like responses made.

On May 24, 1954, an order to show cause was entered requiring John White to show cause why he should not be punished for contempt for refusal to answer any and all material questions put to him as a witness before the grand jury. The order to show cause was returnable May 28, 1954, at 9:30 a. m. On the day in question, John White appeared before John P. O'Hara, as recorder's judge, in response to the order to show cause. He was represented by counsel, and it was stipulated that the transcript of the testimony given by White on May 21, 1954, before the grand jury be admitted in evidence. Counsel for respondent entered an objection to the proceedings befor Judge O'Hara for the reason that Judge O'Hara, as recorder's judge, was disqualified from hearing a contempt of this nature and based his objections upon CLS 1952, § 767.4 (Stat Ann 1953 Cum Supp § 28.944) which provides in part:

> "Provided, That the judge conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Judge O'Hara, as recorder's judge, overruled the objections and found respondent guilty of contempt and pronounced sentence. Upon application, leave to appeal to the Supreme Court was granted. This motion presents two questions, (1) Is a judge of the recorder's court for the city of Detroit, sitting as a judge of the recorder's court under CLS 1952, § 767.3 (Stat Ann 1953 Cum Supp § 28.943) disqualified by the provisions of CLS 1952, § 767.4 (Stat Ann 1953 Cum Supp § 28.944) from citing a witness for contempt and, thereafter, hearing the contempt pro-

ceedings himself, where the alleged contempt arose in the course of a grand jury investigation in the presence of him as the grand juror? (2) Is counsel for a witness called before a one-man grand jury entitled under CLS 1952, § 767.3 (Stat Ann 1953 Cum Supp § 28.943) to be present in the grand jury room during the testimony of his client? The answer to the first question brings into focus the status of a judge sitting as a one-man grand juror. In re Slattery, 310 Mich. 458, we held that the judge conducting a one-man grand jury proceedings is acting in a judicial capacity. Nor does the fact that the one-man grand jury is a judge of the recorder's court of the city of Detroit and not a circuit judge change his status and authority as a judge for the reason that judges of the recorder's court were granted the same power possessed by circuit judges in so far as matters relating to crimes committed in the city of Detroit are concerned. CL 1948, § 726.11 (Stat Ann § 27.3561) reads as follows:

> "The said recorder's court shall have original and exclusive jurisdiction of all prosecutions and proceedings in behalf of the people of this state, for crimes, misdemeanors, and offenses arising under the laws of this state, and committed within the corporate limits of the city of Detroit, except in cases cognizable by the police court of the city of Detroit, or by the justices of the peace of said city; and shall have power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, *and to do all acts which the circuit courts of this state, within their respective jurisdictions, may, in like cases, issue and do by the laws of this state*: Provided, That this section shall not be construed to prevent the grand jury for the county of Wayne from inquiring into and presenting indictments, as heretobefore, for crimes and offenses committed within the limits of said city." (Emphasis added)

This brings us to the principal issue in the case, namely, the power of the court to punish for contempt committed in his presence as a grand juror. We held in Langdon v. Wayne Circuit Judges, 76 Mich. 358, that courts of record have inherent power to hear and determine all contempts of court which the superior courts of England had at the common law. In Nichols v. Judge of Superior Court, 130 Mich. 187 (195), we said:

> "The sound and reasonable rule of law is that, in the absence of express provision in the Constitution itself, the courts of record, established by the Constitution, are clothed by that instrument with the exclusive power over contempts, —a power which has existed from time immemorial. This rule is also established by a long line of authorities."

In People v. Doe, 226 Mich. 5 (19), we said:

> "The power to punish for contempt is inherent in the court. It is a part of the judicial power. It is as firmly vested in the constitutional courts by the Constitution as is the exercise of any other judicial power. That the exercise of the judicial power and all of it can not be taken away from constitutional courts by the legislature is settled. The question is fully considered in Nichols v. Judge of Superior Court, 130 Mich. 187. See, (also, In re Chadwick, supra, (109 Mich. 588); Carter v. Commonwealth, 96 Va. 791 (32 SE 780, 45 LRA 310); Bradley v. State, 111 Ga. 168 (36 SE 630, 50 LRA 691, 78 Am. St. Rep. 157); State v. Woodfin, 27 NC 199 (42 Am. Dec. 161); Fisher v. McDaniel, 9 Wyo. 457 (64 Pac. 1056, 87 Am. St. Rep. 971)."

We are in accord with the reasoning of the court of Arkansas as defined in State v. Morill, 16 Ark. 384. We quoted with approval from the above case in Re Chadwick, 109 Mich. 588 (599):

> "'The legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to this court by the Constitution. If it

could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government, and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the Federal and State institutions, and a favorite theory in the governments of the American people. As far as the act in question goes, in sanctioning the power of the courts to punish as contempts the 'acts' therein enumerated, it is merely declaratory of what the law was before its passage. The prohibitory feature of the act can be regarded as nothing more than the expression of a judicial opinion by the legislature that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation, without the necessity of punishing as a contempt any matter not enumerated in the act. As such, it is entitled to great respect; but to say that it is absolutely binding upon the courts would be to concede that the courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department; because, if the general assembly may deprive the courts of power to punish one class of contempts, it may go the whole length, and divest them of power to punish any contempt.'"

In Bielecki v. United Trucking Service, 247 Mich. 661, 666, and Attorney General v. O'Neill, 280 Mich. 649, 657, the Court quotes with approval from Kiley v. Chicago, M. & St. P. R. Co., 138 Wis. 215, 226 (119 NW 309, 120 NW 756), and Thoe v. Chicago, M. & St. P. R. Co., 181 Wis. 456, 462, 466 (195 NW 407, 29 ALR 1280):

"'The powers of the court and jury in the administration of the law in these respects were distinct and well defined at the time of the adoption of our Constitution and became vested in the court and jury by its provisions. They cannot be abrogated or modified by legislative action to the extent of impairing, in any degree, the judicial power. Under the Constitution courts have become vested with the judicial power to determine the questions of the legal sufficiency of the

evidence to establish the rights of the parties at issue and to apply the law to the facts when found, and this power cannot be withdrawn from them and conferred on juries.' * * *

"'The people of the State of Wisconsin, through the Constitution ordained by them, have conferred upon the courts of this State the judicial power, which includes the power finally to construe, interpret, and apply the law in private as well as public matters. The Constitution having confided this high prerogative to the courts, they would be plainly derelict in their duty if upon any pretense whatever they permitted the powers so confided to them to be exercised by other than judicial officers.'"

Article VII, Section 1, Michigan Constitution of 1908 provides that the judicial power shall be vested in the courts therein enumerated "and such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general law." When the legislature, by the enactment of CL 1948, § 726.1 et seq. (Stat. Ann. § 27.3551 et seq.) provided for the recorder's court of the city of Detroit, it acted in the exercise of that constitutionally conferred power to establish "other courts." Having acted thus, the court so created under constitutional authority and provision, became a constitutional court of record, possessed of the inherent powers appertaining thereto, equally as in the case of the circuit and other courts enumerated in the constitution. It follows that the legislature has no power to deprive a constitutional court, such as a circuit court, of its power to punish for contempt committed in its presence. And, inasmuch as the recorder's court of the city of Detroit possesses all the powers given circuit courts in the State of Michigan, "and to do all acts which the circuit courts of this state, within their respective jurisdictions, may, *in like cases*, issue and do by the laws of this state," it also follows that the legislature has no power to deprive a judge of the recorder's court of its power to punish for con-

tempt committed in its presence. The conclusion is inevitable that when the legislature enacted CLS 1952, § 767.4 (Stat. Ann. 1953 Cum. Supp. § 28.944) in which it attempted to disqualify the grand juror from hearing a charge of contempt arising under CLS 1952, § 767.5 (Stat. Ann. 1953 Cum. Supp. § 28.945) it acted unconstitutionally and exceeded its powers in so doing.

It is also contended by respondent that a witness called before the grand jury is entitled to have his counsel present in the court room at the time the witness testifies before the grand jury. This claim arises out of CLS 1952, § 767.3 (Stat. Ann. 1953 Cum. Supp. § 28.943) which provides:

> "* * * Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. * * *"

Judge O'Hara, the grand juror, interpreted the act in question to mean that a witness might consult with legal counsel, but did not intend that a witness had the right to have his lawyer sit in the court room while the witness was testifying In coming to our conclusion upon this issue we take into consideration that a witness before a grand jury is not on trial for any offense and that secrecy is a paramount adjunct of a grand jury. In People v. Lauder, 82 Mich. 109, it was held that a witness testifying before a grand jury had no right to have the assistance of counsel.

We do not think that the legislature intended, in enacting the above act, that a witness not on trial for any offense was entitled to have an attorney at his elbow to advise him whether or not he should answer a question put to him. We are of the opinion that the legislature intended that a witness was entitled to have legal counsel before or after being subpoenaed and prior to his being called as a witness, or at such other times in the discretion of the grand juror. We hold that a witness legally called to

testify before a grand jury is not entitled to have an attorney with him when he is so testifying. There being competent evidence to sustain the conviction, the judgment is affirmed.

HENRY M. BUTZEL,
LELAND W. CARR,
GEORGE E. BUSHNELL,
EMERSON R. BOYLES,
JOHN R. DETHMERS,
HARRY F. KELLY,
Concurred with SHARPE, *J.*

NEIL E. REID,
Concurred in result

STATE OF MICHIGAN

SUPREME COURT

No. ....

In Re LEE ROY MURCHISON and JOHN WHITE, *Respondents*

Stipulation

It is hereby stipulated by and between Gerald K. O'Brien, Prosecuting Attorney for the County of Wayne, and Charles W. Jones, William L. Colden and George Stone, of counsel, representing Lee Roy Murchison and John White, respondents in the above-captioned matters, as follows:

1. That the application for leave to appeal, and the matters thereto appended, constitute the entire record that would be filed in this court if the applications were granted and records were then filed in pursuance thereof;

2. That the applications shall be noticed for hearing in the Supreme Court for Tuesday, the 8th day of June, 1954;

3. That if the Supreme Court will agree thereto, the applications and appendices may be treated as records on ap-

peal; that the two matters may be consolidated and be treated as one case on appeal; that the consolidated case may be considered as regularly upon the June, 1954 docket of the court; that the consolidated case may be orally argued before the court on Tuesday, June 15th, 1954, or as soon thereafter as the convenience of the court will permit; that the opinion of the court thereon shall in all respects be binding on all the parties in like manner as if the case had been regularly entered on the June, 1954 docket of the court.

FRANK G. MILLARD,
Attorney General,
State of Michigan

GERALD K. O'BRIEN,
Prosecuting Attorney,
County of Wayne

SAMUEL J. TORINA and
JOSEPH G. RASHID,
Assistant Prosecuting
Attorneys

CHARLES W. JONES,
WILLIAM L. COLDEN,
GEORGE STONE,
Of Counsel,
Attorneys for
Respondents

By

June 5, 1954

STATE OF MICHIGAN

IN THE SUPREME COURT

No. . . .

In Re: Lee Roy Murchison, *Petitioner.*

Application for Leave to Appeal

The above named petitioner, Lee Roy Murchinson, respectfully shows unto the Court as follows:

1. That he is a resident of the City of Detroit, Wayne County, Michigan and for some years past has been a member of the Police Force of said City of Detroit.

2. That for some months prior hereto there has been pending in the Recorder's Court for the City of Detroit a so-called Grand Jury investigation under Sections 28.941 et seq. M.S.A. as amended, and that the Honorable John P. O'Hara, Judge of said Recorder's Court has been the so-called one man grand juror in charge of such proceedings.

3. That petitioner was subpoenaed before such grand jury and required to testify before it with respect to certain matters.

4. That thereafter on May 6, 1954, Judge O'Hara, as the one man grand juror, issued an order requiring petitioner to show cause why he should not be "punished for criminal contempt of this court" because he had testified falsely before it.

5. That after a hearing on said order to show cause before Judge O'Hara, petitioner was found guilty on May 14, 1954 of contempt of court and sentenced to be confined in the Wayne County Jail for a period of 60 days.

6. The petitioner has been released on bail fixed by Judge O'Hara pending the outcome of this application for leave to appeal.

7. That petitioner believes he was wrongfully and erroneously convicted, that prejudicial error was committed by the trial court in his conviction, and that the proceedings before Judge O'Hara are unconstitutional and void, and that the reasons and grounds for his appeal are as follows:

(a) The so-called one-man grand jury statute, sections 28.941, et seq., M.S.A., constitutes an unlawful delegation of legislative and executive functions to a judicial officers in violation of Article IV of the Constitution of 1908 of Michigan.

(b) The one-man grand jury statute deprives persons of their liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(c) The one-man grand jury statute deprives persons called before it to testify of the right to have counsel with them in violation of the Constitution of the United States and the Constitution of the State of Michigan.

(d) The contempt hearing before the same judge who is at the same time the complainant, indicter, and prosecutor constitutes a denial of due process of law and of the fair and impartial trial required by the Fourteenth Amendment to the Constitution of the United States.

(e) The contempt hearing before Judge O'Hara is in violation of both the letter and the spirit of the one-man grand jury statute, particularly sections 28.944 and 28.945, M. S. A., as amended by Act 276, P. A. 1951.

(f) The procedure adopted by Judge O'Hara denies to petitioner the rights of a criminal trial, including the right to a trial by jury.

(g) The allegedly false swearing before Judge O'Hara, while it might subject petitioner to a charge of perjury, does not constitute contempt of court.

8. That in support of this application there is attached hereto a concise statement of the proceedings and facts in the court below so far as material to this application.

Petitioner therefore prays that this court grant him leave to appeal from the judgment and sentence of Judge O'Hara finding are unconstitutional and void, and that the reasons and grounds for his appeal are as follows:

(a) The so-called one-man grand jury statute, sections 28.941, et seq., M.S.A., constitutes an unlawful delegation of legislative and executive functions to a judicial officers in violation of Article IV of the Constitution of 1908 of Michigan.

(b) The one-man grand jury statute deprives persons of their liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(c) The one-man grand jury statute deprives persons called before it to testify of the right to have counsel with them in violation of the Constitution of the United States and the Constitution of the State of Michigan.

(d) The contempt hearing before the same judge who is at the same time the complainant, indicter, and prosecutor constitutes a denial of due process of law and of the fair and impartial trial required by the Fourteenth Amendment to the Constitution of the United States.

(e) The contempt hearing before Judge O'Hara is in violation of both the letter and the spirit of the one-man grand jury statute, particularly sections 28.944 and 28.945, M.S.A., as amended by Act 276, P.A. 1951.

(f) The procedure adopted by Judge O'Hara denies to petitioner the rights of a criminal trial, including the right to a trial by jury. 109, J. 88, p. 597, 598, People v. Doe, 226, 5-18.

8. That in support of this application there is attached hereto a concise statement of the proceedings and facts in the court below so far as material to this application.

Petitioner therefore prays that this court grant him leave to appeal from the judgment and sentence of Judge O'Hara finding him guilty of contempt of court and ordering him confined in the Wayne County Jail for 60 days, that the errors aforesaid may be corrected and a proper judgment entered in accordance with his lawful rights.

———, Petitioner.

James Jackson, Sr.,
William L. Colden and
George Stone,
Attorneys for Petitioner
By: George Stone
2550 Guardian Bldg.
Detroit 26, Michigan
WO. 1-5364

State of Michigan,
County of Wayne, ss.

Lee Roy Murchinson, being first duly sworn, did depose and say that he has read the foregoing petition by him subscribed, and that the same is true of his own knowledge and belief, except as to matters therein stated to be upon information and belief, and as to those matters he believes them to be true.

Subscribed and sworn to before me this .... day of May, 1954.

Notary Public, Wayne County, Michigan
My commission expires: ——

STATE OF MICHIGAN

IN THE SUPREME COURT

No. ....

In Re JOHN WHITE, *Petitioner*

Application for Leave to Appeal

That the above named petitioner, John White, respectfully shows unto the Court as follows:

(1) That he is a resident of the City of Detroit, County of Wayne and State of Michigan, and has been such a resident for the past fifteen (15) years and upwards.

(2) That for some months prior hereto there has been pending in the Recorder's Court for the City of Detroit a so-called Grand Jury investigation under Sections 28.941 et seq. M. S. A. as amended, and that the Honorable John P. O'Hara, Judge of said Recorder's Court has been the so-called one man grand juror in charge of such proceedings.

(3) That petitioner was subpoenaed before such grand jury and required to testify before it with respect to certain matters.

(4) That thereafter on May 24, 1954, Judge O'Hara, as the one man grand juror, issued an order requiring petitioner to show cause why he should not "be punished for criminal contempt of this Court" because he refused "to answer any and all material questions put to him by this Court and the Assistant Prosecutor assigned to this judicial inquiry until and unless his attorney was present in the Courtroom during and throughout the entire interrogation of the witness" and further that he refused "to answer some material questions put to him by this Court in the course of the judicial conduct by it without stating any reason for his refusal to answer."

(5) That after a hearing on said Order to Show Cause before the Honorable Judge O'Hara on the 28th day of May, 1954, this petitioner was found guilty of contempt of Court and sentenced to be confined in the Detroit House of Correction for a period of Ninety (90) days and assessed a fine in the amount of Two Hundred Fifty ($250.00) Dollars.

(6) That petitioner has been released on bail fixed by Judge O'Hara pending the outcome of this application for leave to appeal.

(7) Tht petitioner believes he was wrongfully and erroneously convicted, that prejudicial error was committed by the trial court in his conviction, and that the proceedings before Judge O'Hara are unconstitutional and void, and that the reasons and grounds for his appeal are as follows:

(a) The so-called one-man grand jury statute, sections 28.941, et seq., M.S.A., constitutes an unlawful delegation of legislative and executive functions to judicial officers in violation of Article IV of the Constitution of 1908 of Michigan.

(b) The one-man grand jury statute deprives persons of their liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(c) The one-man grand jury statute deprives persons called before it to testify of the right to have counsel with them in violation of the Constitution of the United States Constitution of the State of Michigan.

(d) The contempt hearing before the same judge who is at the same time the complainant, indicter, and prosecutor constitutes a denial of due process of law and of the fair and impartial trial required by the Fourteenth Amendment to the Constitution of the United States.

(e) The contempt hearing before Judge O'Hara is in violation of both the letter and the spirit of the one-man grand jury statute, particularly sections 28.944 and 28.945, M.S.A., as amended by Act 276, P. A. 1951.

(f) The procedure adopted by Judge O'Hara denies to petitioner the rights of a criminal trial, including the right to a trial by jury.

(g) The statute creating the so called one-man grand jury merely conferred upon the Judge conducting the inquiry the powers of an investigator and or inquisitor, and as such investigator and or inquisitor he is not acting in a judicial capacity and hence is deprived of the power inherent in the Court as a judicial officer except to those powers expressly granted by the statute hereinbefore set forth.

(h) That the right to have counsel as provided by the statute entitles the petitioner herein to the usual services rendered by an attorney and counselor, including the right to have such representation at all times during the inquiry.

(i) That the court errored in commenting on the attitude of the petitioner herein during his appearance before the Honorable John P. O'Hara in his capacity as the so called one-man grand jury, and specifically the refusal after motion expunge said remarks from the records.

(8) That in support of this application there is attached hereto a concise statement of the proceedings and facts in the Court below so far as material to this application.

Petitioner therefore prays that this court grant him leave to appeal from the judgment and sentence of Judge O'Hara finding him guilty of contempt of court and ordering him confined to the Detroit House of Correction for

Ninety (90) days and assessed the fine of Two Hundred Fifty ($250.00) Dollars.

.....

Petitioner

Loomis, Jones & Colden
By: William L. Colden
LOOMIS, JONES & COLDEN,
CHARLES W. JONES,
WILLIAM L. COLDEN,
and GEORGE STONE,
Counsel-Attorneys for Petitioner
1308 Broadway - Suite 505
Detroit 26, Michigan
WO. 2-3275

STATE OF MICHIGAN,
COUNTY OF WAYNE, ss.

JOHN WHITE, being first duly sworn, did depose and say that he has read the foregoing petition by him subscribed, and that the same is true of his own knowledge and belief, and as to those matters he believes them to be true.

.....

Subscribed and sworn to before me this 7th day of June, A. D. 1954.
Edith E. Jones
Notary Public, Wayne County, Michigan
My Commission Expires: August 12, 1955

LIBRARY
SUPREME COURT, U.S.

No. 405

Office - Supreme Court, U.S.
FEB 2 0 1955
ROBERT S. WILLEY, Clerk

IN THE

Supreme Court of the United States

APRIL TERM, 1955

In the Matter of

LEE ROY MURCHISON

In the Matter of

JOHN WHITE

On a Writ of Certiorari to the Supreme Court of Michigan

BRIEF FOR THE PETITIONERS

COBB, HOWARD AND HAYES
Attorneys at Law
613 F Street, N.W.

By:

JAMES A. COBB
GEORGE E. C. HAYES
Counsel of Record
for the Petitioners

Of Counsel:

WILLIAM L. COLDEN
Attorney at Law
1308 Broadway
Detroit, Michigan

CHARLES W. JONES
Attorney at Law
1308 Broadway
Detroit, Michigan

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Statement of Jurisdictional Grounds	1
Statutes and Constitutional Provisions Involved	4
Questions Presented	4
Statement of Case	5
Summary of Argument	10
Argument	10
1. History	10
2. Question No. 1	12
3. Question No. 2	14
4. Question No. 3	17
5. Question No. 4	18
Conclusion	24
Appendix	26
Sections 28.943-28.944; Michigan Statutes Annotated; Callaghan's Pocket Supplement, 92-103	26
Article IV of the Michigan Constitution of 1908: Division of the Powers of Government	33
Fourteenth Amendment of the Constitution of the United States	33

TABLE OF CASES

Adams v. U. S. ex rel McCann, 625 S. Ct. 236, 87 L. Ed. 268	17
Avery v. Alabama, 308 U. S. 444, 84 L. Ed. 277	21
Coblentz v. State, 164 Md. 558, 166 Atl. 45	13
Cooke v. U. S., 45 S. Ct. 390, 69 L. Ed. 267	17
Ex Parte Hudgings, 249 N.S. 378, 63 L. Ed. 656	23

Page

Hurtado v. California, 110 U.S. 480, 23 L. Ed. 682 15
In Re: Dingley, 182 Mich. 44, 148 N. W. 218 17
In Re: Michael, 326 U. S. 324, 66 S. Ct. 78 22
In Re: Oliver, 333 U. S. 257, 92 L. Ed. 682 .....10, 16, 17, 19, 20, 22
In Re: Richardson, 247 N. Y. 401, 160 N. E. 654 17
In Re: Slattery, 310 Mich. 458, 17 N. W. (2d) 249 14
Jordan v. Massachusetts, 32 S. Ct. 651, 56 16
Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478 15
Moore v. Dempsey, 261 U. S. 85, 67 L. Ed. 543 15
People v. Bermel, 71 New York Misc. 356, 26 N. Y. Criminal Reports 47, 128 N. Y. S 524 21
People v. Mondon, 103 N. Y. 21, 8 N. E. 496 21
Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 21
Prentiss v. Atlantic Coastline, 211 U. S. 210, 53 L. Ed. 150 15
State v. Lawler, 267 Wis. 432, 105 ALR 568 .....13, 14
Tumey v. Ohio, 47 S. Ct. 437, 71 L. Ed. 749 16

CONSTITUTIONAL PROVISIONS AND STATUTES

14th Amendment of Constitution of the United States App. 14, 33
Art. IV of the Constitution of the State of Michigan App. 33
Michigan Statutes Annotated, 1953, Cumulative Supplement, Paragraphs 28.943, 28.944 .....App. 26

IN THE

Supreme Court of the United States

APRIL TERM, 1955

In the Matter of

LEE ROY MURCHISON

In the Matter of

JOHN WHITE

On a Writ of Certiorari to the Supreme Court of Michigan

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinions of the Supreme Court for the State of Michigan are reported in:

In Re White, 65 N.W. (2nd Ser.) 299; 340 Mich. 140.
In Re Murchison, 65 N.W. (2nd Ser.) 301; 340 Mich. 151.

STATEMENT OF JURISDICTIONAL GROUNDS

Inasmuch as the Court consolidated the cases of Lee Roy Murchison and John White it is our opinion that the statement of jurisdictional grounds as to each petitioner should be listed separately under the respective headings:

Lee Roy Murchison:

The opinion and judgment of the Supreme Court for the State of Michigan affirming the conviction of the petitioner

by the Trial Court (Recorders Court for the City of Detroit) was entered on the 6th day of July, 1954, the jurisdiction of this Court to review the judgment is invoked under the terms of Title 28, United States Code Annotated, Section 1257 (3). The petitioner by timely objections in the Trial Court contested the validity of a Judge of the Recorders Court or Trial Court, sitting as a grand jury and also as a Court (Record 35-37-38-86). The objections were over-ruled and the trial court continued the hearing (Record 38 et seq.). The petitioner was found guilty by Judge John P. O'Hara, Trial Judge of the Recorders Court and one man grand jury of the Recorders Court on May 14, 1954 (Record 180).

The objections were again renewed on petitioners' applications for leave to appeal to the Supreme Court for the State of Michigan (Record 2-3). The application for leave to appeal having been granted on 9th June 1954 (Record 1) and after argument the Supreme Court for the State of Michigan in its opinion of July 6, 1954 (Record 107 to 110) failed to pass upon petitioners' claims that the contempt hearing before the Trial Judge constituted a denial of due process of law as required by the Fourteenth Amendment (App. p. 33) but was content to rest its opinion on the theory that petitioners conduct before the grand jury could at one and the same time be the subject of perjury and contempt (Record 110). Petitioners obtained a stay of the mandate of the Court pending perfection of his application for certiorari.

In re: John White:

The opinion and the judgment of the Supreme Court for the State of Michigan was entered on the 6th day of July 1954, confirming the conviction for contempt of the Recorders Court for the City of Detroit on May 28, 1954 (Record 177). Petitioner by Motion to Dismiss the Order to Show Cause timely applied for appropriate relief in the Trial Court prior to the taking of any testimony. The bases for the motion to dismiss were as follows:

1. The Order to Show Cause was filed by the one man grand jury and/or Judge and not by a competent public official.

2. That the trial of the contempt citation should be assigned to another Judge other than Judge O'Hara acting as a one man grand jury.

3. That the grand jury statute constituted an unlawful delegation of legislative and executive functions to a judicial officer in violation of Article 4, the Constitution of 1908 of the State of Michigan (Record 156).

4. The one man grand jury statute violates the due process clause of the 14th Amendment of the Constitution of the United States (Record 156-157-158).

These objections were over-ruled by the Trial Court (Record 174) and the petitioner found guilty (Record 177). The same objections were again made in the petitioner's application for leave to appeal to the Supreme Court for the State of Michigan (Record 128-129). The said application was granted on June 9, 1954 (Record 182). The Supreme Court for the State of Michigan in its opinion of July 6, 1954, by-passed the Federal issues raised as to due process (Record 183 to 191) and contented itself with construing the statute by asserting that a Judge of the Recorders Court (Trial Court), sitting as a one man grand jury, was acting in a judicial capacity and as a consequence could punish for contempt committed in the presence of the Court (Record 190). The Court further held that the legislation did not intend a witness to have legal counsel while testifying before a one man grand jury. Petitioner obtained a stay of the mandate of the Supreme Court for the State of Michigan pending the perfection of his application for a writ of certiorari in this Court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 28.933-28.944, Michigan Statutes Annotated: Callaghan's Pocket Supplement 92-103.

2. Article IV of the Michigan Constitution 1908, Division of the Powers of Government.

3. Constitution of the United States of America—Article 14, Section 1.

Inasmuch as the provisions involved in the above-cited statutes and constitutional provisions are lengthy, the pertinent texts thereof are set forth in the appendix.

QUESTIONS PRESENTED

1. Is the one man grand jury statute constitutional?

2. Can the Judge at one and the same time be a one man grand jury and still have the inherent power to adjudicate one in contempt while acting in a so-called judicial capacity without violating the concept of due process of law as assured by the 14th Amendment of the Constitution of the United States?

3. Does the interpretation given to Section 28.944 of the Michigan Statute by the Supreme Court of Michigan amount to a denial to the petitioners of their constitutional rights of due process?

4. Was not the interpretation of the Supreme Court of Michigan of Section 28.943, Michigan Statute Annotated, to the effect that "a witness was entitled to have legal counsel before or after being subpoenaed, and prior to his being called as a witness, or at such other times in the discretion of the grand juror" not only an expressed violation of the terms of the Michigan Statute but a violation as well of the constitutional rights of the petitioners?

STATEMENT OF CASE

In the Matter of John White

On March 16, 1954, Judge John P. O'Hara, one of the Judges of Recorder's Court for the City of Detroit, County of Wayne, State of Michigan, was selected and appointed to conduct a one man grand jury under Section 28.943, Michigan Statutes Annotated, and following sections appurtenant thereto, to investigate police corruption in connection with gambling (R. p. 133). He entered upon his duties the following day and the investigation commenced immediately.

The petitioner herein, John White, was subpoenaed to testify before Judge John P. O'Hara, grand juror, on May 21, 1954, and in response to said subpoena did appear before Judge John P. O'Hara sitting as a one man grand juror on May 21, 1954 (R. pp. 136-137).

On examination before Judge John P. O'Hara, the petitioner White stated his name and on being asked other questions declined to answer and did refuse to answer any questions "unless my attorney is here with me at all times, from the beginning to end." (R. pp. 138-142.)

On May 24, 1954, an order to show cause was entered requiring John White to show cause why he should not be punished for contempt for refusal to answer any and all material questions put to him as a witness before the grand jury (R. pp. 136-137). The order to show cause was returnable May 28, 1954, at which time petitioner herein did appear in response to said order returnable before John P. O'Hara as Recorder's Judge (R. pp. 145-146). By stipulation the transcript of testimony given by White on May 21, 1954, before the grand jury was admitted in evidence (R. p. 146). The essence of that transcript of testimony is to the effect that White refused to answer unless accompanied by counsel as hereinbefore set forth. Counsel for the respondent entered an objection to the proceedings before Judge O'Hara for the reasons the Act in question was unconstitutional and that Judge O'Hara

as Recorder's Judge was disqualified from hearing a contempt of this nature and based these objections upon the 14th Amendment of the Constitution and Article IV of the Michigan Constitution, Michigan Statutes Annotated, 1953 Cumulative Supplement, Paragraph 28.944 (App. pp. 28 and 33) which provides in part:

> "... The Judge conducting an inquiry under Section 3 of this Act shall be disqualified from acting as the examining magistrate in connection with the hearing on any complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under Section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Judge O'Hara overruled the objections and found the respondent guilty of contempt and sentenced him to be confined in and/or at Detroit House of Correction for a period of Ninety (90) days and that he pay a fine of Two Hundred Fifty ($250.00) Dollars (R. pp. 176-178). Counsel for petitioner requested a stay of proceedings until application for leave to appeal to the Supreme Court for the State of Michigan was granted (R. p. 177). Judge O'Hara granted a stay of proceedings and upon applying for leave to appeal the same was granted (R. p. 177).

The application for leave to appeal posed the following questions: (1) Is the Statute in question unconstitutional because it is contrary to the due process clause of the Fourteenth Amendment, Art. IV of the Michigan Constitution? (2) Is a Judge for the Recorder's Court under C.L.S. 1952, Paragraph 767.3, M.S.A. Cum. Supp., Paragraph 28.943, disqualified by the provisions of C.L.S., 1952, Paragraph 767.4, M.S.A. Cum. Supp., Paragraph 28.944, for citing a witness for contempt and thereafter hearing the contempt proceedings himself where the alleged contempt rose in the course of a grand jury investigation in the presence of him as a grand juror? (3) Is

counsel for a witness called before a one man grand jury entitled under C.L.S. 1952, Paragraph 767.3 M.S.A., Cum. Supp. Paragraph 28.943 to be present in the grand jury room during the testimony of this client? The Michigan Supreme Court on July 6, 1954, affirmed the lower Court. (4) In assuming the duties of a grand jury, did Judge O'Hara continue to be vested with judicial functions and/or safeguards while acting in an administrative capacity? (5) Does the legislature have the authority to impose upon the judiciary duties that are not judicial? (R. pp. 127-130.)

The petitioner immediately filed a motion for a rehearing with the Supreme Court for the State of Michigan, and the petitioner was released on bail in the amount of Three Thousand ($3,000.00) Dollars by the Court pending a decision on the motion for rehearing (R. p. 205). That on the 8th day of September, 1954, the Court denied the motion for rehearing (R. p. 206). That following the denial of the motion for rehearing the petitioner White made application for a stay of proceedings with the Court pending his application to the Supreme Court of the United States of America for leave to file a Writ of Certiorari to review the proceedings hereinbefore set forth (R. p. 206).

On the 14th day of September, 1954, the Court granted a stay of proceedings pending application for Writ of Certiorari in the Supreme Court of the United States conditioned that said application be fled within thirty (30) days from the 14th day of September, and the petitioner was released on bond in the sum of Three Thousand ($3,000.00) Dollars (R. p. 206). The Supreme Court of the United States on the 6th day of December, 1954, entered its Order allowing a Writ of Certiorari as prayed for by the petitioner (R. p. 207).

In the Matter of Lee Roy Murchison

That the petitioner, Lee Roy Murchison, was subpoenaed to testify before Judge John P. O'Hara, grand juror, and in response to such subpoena did appear on that date be

fore Judge John P. O'Hara sitting as a one man grand jury (R. p. 4).

On examination before Judge John P. O'Hara, certain witnesses did testify with respect to visits made by Murchison to the residence of one Edward Stephens (R. pp. 9-39-40-51-52-53). The petitioner denied in secret session ever having visited the residence of Edward Stephens and was contradicted by two police officers. The other police officer, to wit, a Lieutenant of the Police Department and an Inspector, testified that they had seen Murchison visiting the home of Edward Stephens at 945 Josephat, Detroit, Michigan, and introduced a purported picture of Murchison on the front porch of that address (R. 9-11-12).

On May 6, 1954, Judge O'Hara acting as a one man grand jury issued an order to show cause directed to the petitioner requiring him to show cause why he should not be punished "for criminal contempt of this Court" for false swearing (R. p. 7-8). This order to show cause was returnable on a day certain, and beginning Monday, May 10, 1954, and continuing through Wednesday, May 14, 1954, the petitioner did appear in response to said order returnable before Judge O'Hara (R. 30). Counsel for petitioner entered an objection to the proceedings before Judge O'Hara for the reasons that the Statute was unconstitutional and that Judge O'Hara as Recorder's Judge was disqualified from hearing a contempt of this nature and based his objection upon Michigan Statutes Annotated 1953 Cumulative Supplement, Paragraph 28.944 (App. p. 28) which provides in part:

> ". . . The Judge conducting an inquiry under Section 3 of this Act shall be disqualified from acting as the examining magistrate in connection with the hearing on any complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under Section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Judge O'Hara overruled the objection and found the respondent guilty of contempt and sentenced him to be confined in the County Jail of Wayne County for a period of Sixty (60) days (R. p. 105). Counsel for petitioner requested a stay of proceedings until application for leave to appeal to the Supreme Court for the State of Michigan was granted. Judge O'Hara granted a stay of proceedings and upon applying for leave to appeal the same was granted (R. p. 106).

The application for appeal posed a number of questions among which were the following: (1) Is the Statute in question unconstitutional because it is contrary to the due process clause of the Fourteenth Amendment, Art. IV of the Michigan Constitution? (2) Was Judge O'Hara sitting as a one man grand jury under the pertinent sections of the Statute disqualified by the provisions of the Statute for citing a witness for contempt and thereafter hearing the contempt proceedings himself where the alleged contempt laws in the course of a grand jury investigation in the presence of him as a grand jury? (3) In assuming the duties of a grand jury, did Judge O'Hara continue to be vested with judicial functions and/or safe guards while acting in an administrative capacity? (4) Does the legislature have the authority to impose upon the judiciary duties that are not judcial? (R. p. 3.)

On July 6, 1954, the Supreme Court affirmed the Lower Court (R. pp. 107-108-109-110). That the petitioner immediately filed a motion for rehearing with the Court, and was released on bail in the amount of Three Thousand ($3,000.00) Dollars, pending a decision on a motion for rehearing (R. pp. 111-124).

On the 8th day of September the Court denied the motion for rehearing (R. p. 125) That following the denial of the motion for rehearing the petitioner Murchison made application to the Supreme Court of the United States of America for leave to file a Writ of Certiorari to review the proceedings hereinbefore set forth (R. p. 126).

The Supreme Court of the United States on the 6th day of December, 1954, entered its Order allowing the Writ of Certiorari as prayed for by the petitioner (R. p. 207).

SUMMARY OF ARGUMENT

1. History of Development of one-man grand jury act as related to instant cases.

2. One-man Grand Jury Act is unconstitutional as promulgated.

3. One-man Grand Jury Act is unconstitutional because in its functioning it lends itself to the violation of basic constitutional rights.

4. In instant cases, interpretations given the Michigan Statutes involved, demonstrate violations of constitutional rights of petitioners.

ARGUMENT

History

Prior to adoption of the present Constitution (1908) of the State of Michigan, the previous Constitution required that Criminal prosecutions be begun by presentment or indictment issued by a traditional grand jury. With the compulsory provision of the Constitution of 1835 no longer in effect, the legislature for the State of Michigan enacted in 1917 the so-called One Man Grand Jury Act. The effect of such legislation was to vest in a single individual (Judges of Courts of Record, Police Judges and Justices of the Peace) the power to investigate crime and issue indictments as a result of such investigation. The effect of such legislation resulted in much litigation and attendant criticism. Mr. Justice Black, in *Re: Oliver, 333 U.S. 257 (203), 93 L. Ed. 682 (689)* characterized the One Man Grand Jury in the following language:

> "In carrying out this authority a judge-grand jury is authorized to appoint its own prosecutors, detec

> tives and aides at public expense, all or any of whom may, at the discretion of the justice of the peace or judge, be admitted to the inquiry. Mich. Stat. Ann. § 28.944 (Henderson 1938). A witness may be asked questions on all subjects and need not be advised of his privilege against self-incrimination, even though the questioning is in secret. And these secret interrogations can be carried on day or night, in a public place or a 'hideout', a courthouse, an office building, a hotel room, a home or a place of business; so well is this ambulatory power understood in Michigan that the one-man grand jury is also popularly referred to as the 'portable grand jury' ".

It is our reasoned opinion that such characterizations, together with the language of other Justices touching upon this proposition and the decision had in Re: Oliver resulted in the legislature for the State of Michigan repealing the Act. In its stead the legislature created a three-judge grand jury, which Act was shortly thereafter repealed and the present Act substituted (App. p. 26).

It will be noted that the newest edition of the one-man grand jury attempted to set-up safeguards for the protection of individuals among other things by deleting certain objectional features. Attention is called to the following language of the Act:

> "Provided, That the (judge) conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 hereto, (except alleged contempt for neglect or refusal to appear in response to a summons or subpoena)."

These safety values or protection of personal rights were not contained in the Act of 1917.

In the instant causes the Supreme Court for the State of Michigan by its decision removed this protection and re-

turns to the original idea of an investigating and executive official arriving at a purported judicial conclusion and pronouncement in camera. The issuance of an order to show cause after a so-called judicial finding is a farcical attempt to pay homage to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

We now address ourselves by way of concise argument to each of the respective questions posed, urging each as a reason why the relief sought by petitioners should be granted.

1. Is the One Man Grand Jury Statute Constitutional?

The question of the constitutionality of the Grand Jury Statute in Michigan has previously been before this Court but has never been expressly passed upon. In this connection, we call attention to the fact that in the case of Re Oliver, 333 U.S. 257, 92 L. Ed. 682, the necessity of this Court determining the constitutionality of the Michigan Grand Jury Statute is evidenced. Mr. Justice Black, in delivering the majority opinion in this case, uses the following language:

> "The petitioner does not here challenge the constitutional power of Michigan to grant traditional inquizitory grand jury power to a single Judge, and, therefore, we do not concern ourselves with that question."

In the instant case this question of the inherent unconstitutional power of Michigan to function through a one man grand jury was raised at the threshold and carried through each step of the presentations in the courts below. The constitutionality of this one man grand jury we believe to have been effectively challenged in the above cited case by the language of Mr. Justice Rutledge in his concurring opinion:

> "Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically

separate powers of grand jury, committing magistrate, prosecutor, trial judge, and petit jury * * *.

"This aggregation of powers and inherent concomitant denial of historic freedoms were unknown to the common law. * * * They are altogether at variance with our tradition and system of government. * * * They cannot stand the test of constitutionality * * * there is no semblance of due process * * * *"

Even in the dissenting opinion of Mr. Justice Frankfurter in the cause above referred to, it is evident that the position of this Court is that the constitutionality of the one-man grand jury system in Michigan should be passed upon only when the issue has been properly raised in the Court below and such courts have had an adequate opportunity to pass upon same, and where the record shows what actually happened under this circumstance so that this Court might properly determine as to whether such procedure offends the due process clause of the 14th Amendment of the Constitution of the United States. It is respectfully urged that the instant case meets this requirement and affords such an opportunity to this Court.

Traditionally, a grand jury, common law or statutory, is an investigating body and its final act, if the circumstance warrant, is the issuance of an indictment against the accused. At no time does it make any adjudication or function in a judicial capacity.

"The grand jury is not a judicial tribunal, but rather a functional and accusing body."

State v. Lawler 267 Wis. 412; 105 A.L.R. 568;
Coblentz v. State 164 Md. 558; 166 A. 45.

The anomalous situation that obtains in Michigan vests in one and the same individual, the investigation and accusatory powers of a grand jury and at the same time the powers of a judicial officer. It is this combination of the historically separate and distinct powers that renders the Michigan procedure vicious, and inherently and diametri-

cally opposed to the basic concepts of freedom from oppression as guaranteed by the Fourteenth Amendment.

2. *Can the Judge at One and the Same Time Be a One Man Grand Jury and Still Have the Inherent Power to Adjudicate One in Contempt while Acting in A So-Called Judicial Capacity without Violating the Concept of Due Process of Law as Assured by the 14th Amendment of the Constitution of the United States?*

In addressing ourselves to question Number Two (2), we face the interpretation of the functioning of a one-man grand jury by the Supreme Court of Michigan as enunciated in the instant cases. The Michigan Supreme Court presumably relied on the case, among other things, of *In Re Slattery*, 310 Mich. 458, 17 N.W. (2d) 249, cited in People's Reply Brief to Respondent's Supplemental Brief. The quotation from that Reply Brief is:

> "So that there may be no further question, we hold that the Judge conducting the one-man grand jury proceedings is acting in a judicial capacity."

It is here urged that the Court can not at one and the same time function as a one man grand jury and reserve to itself the functioning of a Court so as to make possible the adjudicating of an individual as being in contempt of said court. In acting as a grand jury, it is acting in an administrative and/or executive capacity. In acting as a court it is, by definition, acting in a judicial capacity. To combine these functions is in derogation of *Article IV of the Constitution of the State of Michigan*. (Appendix, p. 33) Whenever the question has been presented as to whether a grand jury inquiry is a judicial one in the sense of exercising of judicial power, the courts have answered in the negative. *State* v. *Lawler*, 221 Wis. 432, 267 N.W. 65, 105 A.L.R. 568; *Cobleutz* v. *State*, 164 Md. 558, 166 A. 45. In order to determine whether a person or body functions

as a court or in some other capacity, it s necessary to consider more than the character of the individual or actor. This Court has said in *Prentiss* v. *Atlantic Coast Line*, 211 U.S. 210, 53 L. Ed. 150, that:

> "It is the nature of the final act that determines the nature of the previous inquiry."

A grand juror's final act is the issuance of a warrant. He determines no issues and makes no adjudication. The final action in the instant cases by which the petitioners are aggrieved is an adjudication of contempt which is unquestionably a judicial determination. It is anomalous to say that one individual can at one and the same time exercise both of these functions. This cannot be better demonstrated than by the use of the words of Mr. Justice Rutledge in *Re Oliver*, *supra*, which though repetitive, we here set forth:

> "Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury * * *."

Where, as there, there is the attempt on the part of the one-man grand jury to exercise the combined functions of a grand jury, a petty jury, a prosecutor, and of a trial judge, the denial to these petitioners of due process of law is emphasized. Even if the statutory allowance of a one-man grand jury be conceded as being constitutional, there can be no conceivable question but that the functioning as a one man grand jury is violative of the individuals' rights to due process of law as assured under the 14th Amendment of the Constitution of the United States. As to this fundamental proposition, this Court has spoken over a long period of years and without variance. *Kennard* v. *Louisiana*, 92 U.S. 480, 23 L. Ed. 478; *Hurtado* v. *California*, 110 U.S. 516, 28 L. Ed. 232; *Moore* v. *Dempsey*, 261 U.S. 85, 67 L. Ed. 543.

That so called grand jury here was investigator, prosecuter and compiainant is strongly emphasized in the Murchison case by the fact that no complaint, petition, or affidavit was filed in support of the issuance of the order to show cause. That order was issued by the Judge on the basis of what existed in his own mind, i.e., of his personal knowledge of the facts without any other basis and indicated clearly that he had already made a decision as to the guilt of petitioner. That order recites in fact that "the testimony given by Murchison was false and constitutes criminal contempt." (See Record, p. 8.) The order further directs Murchison to appear at a stated time and show cause "why he should not be punished for criminal contempt of this Court because of his aforesaid act." (Record, p. 8.) Thus it appears that regardless of the so called open and public hearing held by the court on this show cause, the judge had already predetermined Murchison's guilt for contempt, and that the hearing was for the purpose of determining the amount of punishment to be imposed upon him.

It is obvious that in holding such a public hearing, the trial court was endeavoring to avoid infringement upon the constitutional guarantees of the Fourteenth Amendment and the mandates specifically laid down by this court. *In re Oliver*, 333 U.S. 257, 92 L. Ed. 682. However, that case as well as many other cases decided by this court require that in addition to any public hearing opportunity to confront the accusers, produce witnesses and have counsel, there must also be a fair and impartial tribunal. A tribunal which has prejudiced a case and has made a predisposition can not be said within the meaning of the constitutional guarantees to be a fair and impartial tribunal.

See *Tumey* v. *Ohio*, 273 U.S. 510; 47 S. Ct. 437, 71 L. Ed. 749;

Jordan v. *Massachusetts*, 225 U.S. 167; 32 S. Ct. 651, 56 L. Ed. 1038;

Adams v. *U. S. ex rel. McCann*, 625 S. Ct. 236, 87 L. Ed. 268;
Cooke v. *U. S.*, 267 U.S. 257; 45 S. Ct. 390, 69 L. Ed. 767;
In re Dingley, 182 Mich. 44, 148 N.W. 218.

The condemnation of the procedure countenance by the Michigan authorities has been condemned in strong language. *In re Richardson*, 247 New York 401, 160 N.E. 654, in an opinion by Judge Cardoza it was held:

> "The judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives * * * the outstanding fact remains that his conclusion is to be announced upon a case developed by himself. Centuries of common law tradition warn us with echoing impressiveness that this is not a judge's work. We should be sorry to weaken this tradition by any judgment of this Court."

See opinion of Mr. Justice Rutledge concurring in *re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682.

3. Does the Interpretation Given to Section 28.944 of the Michigan Statute by the Supreme Court of Michigan Amount to a Denial to the Petitioners of Their Constitutional Rights of Due Process?

The Michigan Statute having to do with the setting up of the one-man grand jury, reading in part from Section 28.944, sets forth as follows (Appendix, p. 29):

> "* * * Provided, That the judge conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or *from hearing and charge at contempt* under section 5 hereof * * *" (Italics ours.)

The foregoing is a part of *Public Act No. 270, 1954, State of Michigan*, effective September 28, 1954. We believe that

there can be no question but that this was an attempt on the part of the State of Michigan to meet issues posed by this Court in its decision in the case of *Re Oliver, supra*. The Supreme Court of Michigan in interpreting the foregoing part of the statute in the instant case, in *Re White*, in the language of Judge Sharp held:

> "It follows that the legislature has no power to deprive a constitutional court, * * * of its power to punish for contempt committed in its presence * * *."

It seems to us apparent that the Michigan Supreme Court, in adopting this language, loses sight of the fact that the person here functioning and who is adjudicating persons in contempt on the theory of being a Court is the same individual whom the legislature was creating as a one-man grand jury, and whom, it apparently expressly intended, should not have these anomalous powers. This interpretation simply re-creates the possibility which apparently the Michigan Legislature desired to correct; of giving such a basis for denial to persons situated as these petitioners of their constitutional rights of due process. Aside from it being a denial of due process per se, it is certainly directly opposed to the underlying decision in *Re Oliver, supra*, and to the apparent corrective step undertaken by the Michigan Legislature.

4. *Was not the Interpretation of the Supreme Court of Michigan of Section 28.943, Michigan Statute Annotated, to the Effect that "a Witness was Entitled to Have Legal Counsel Before or After Being Subpoenaed, and Prior to His Being Called as a Witness, or at Such Other Times in the Discretion of the Grand Juror" not Only an Expressed Violation of the Terms of the Michigan Statute but a Violation as Well of the Constitutional Rights of the Petitioners?*

The *Michigan Statute Annotated, section 28.943* (Appendix, p. 26) sets forth in part as follows:

"* * * Any person called before the grand jury shall at *all times* be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry *without being subject to a citation for contempt.*" (Italics ours.)

It seems to us a distortion of language or an unjustified interpretation of unambiguous language when the Supreme Court of Michigan, speaking through Judge Sharp in the *White* case, in interpreting the foregoing language, indicates that:

"* * * A witness was entitled to have legal counsel before or after being subpoenaed and prior to his being called as a witness, or at such other times in the discretion of the grand jury * * *".

It is to be remembered that the adjudication of contempt in the *White* case was presumably not based upon any refusal on the part of White to testify but rather upon his refusal to testify without having the advantage of counsel. The language of the Statute here again is an apparent attempt to meet issues created by the decision of this Court in *Re Oliver*, *supra*, and to correct abuses which the one-man grand jury principle gave rise to. White, we respectfully submit, was exercising his constitutional rights assured him by the Constitution of the United States and expressly reiterated by the Michigan legislature in the language above quoted when he refused to answer questions without the privilege accorded him of having counsel to advise him. The extent to which the rights of the petitioners might be violated is demonstrated by the fact that the refusals were not categorical refusals but rather an expression of unwillingness to be committed to propositions without the exercise of a right to which he was legally entitled. It is to be noted further in this connection that in each instance the petitioners were served with orders to show cause. The language of these orders is

in and of itself significant and condemnatory of the practice engaged in by the one-man grand jury, who at once and the same time adjudicates for alleged contempt committed in his presence. There is no requirement to show cause why the petitioners, respectively, should not be adjudicated in contempt but rather that they should show cause why they should not be punished for the contempt already adjudicated. This is essentially a trial in camera and expressly forbidden by the Constitution of the United States and as recently pointed out in *Re Oliver, supra.*

It cannot be reasonably argued that any distinction in this constitutional right can be made between a witness and a defendant, particularly when the so-called witness faces, as here, an adjudication of contempt and a penalty imposed. Particularly is this true where, as here, reliance is upon a statute, the language of which is clear. Where the language of a statute is plain and unambiguous, there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning.

The Supreme Court of Michigan in its opinion in the instant case has held that petitioner White was not entitled to the benefit of counsel while before the one-man grand jury for the reason "that a witness before a grand jury is not on trial for any offense and that secrecy is a paramount adjunct of a grand jury." (Trans. Record, p. 191.) The reasoning of that court is based upon the apparently simple proposition that White was merely a "witness" before the grand jury. The record in the instant case, however, follows that the grand jury was established for the purpose of investigating in the operation of numbers syndicates and the relation of certain police officers therewith, and that White called as a witness to the inquiry was specifically interrogated in a manner definitely directed to establishing his criminal connections with the offense involved. He was thus immediately placed in the position of a potential defendant and as such a potential defendant he was entitled to the benefit of the constitution-

al guarantees of due process which among other things included the right to advice of counsel.

> See *Powell* v. *Alabama*, 287 U.S. 45, 68, 70; 53 S. Ct. 55, 63, 64, 77 L. Ed. 158;
> *Avery* v. *Alabama*, 308 U.S. 444, 6 S. Ct. 321, 84 L. Ed. 277.

In *People* v. *Bermel*, 71 N.Y. Miscel. 356, 26 N.Y. Criminal Rep. 47, an indictment growing out of a grand jury was quashed and the court said:

> "Briefly stated, if the person testifying is a mere witness, he must claim his privilege on the ground that his answers will incriminate him, whereas, if he be in fact the party proceeded against, he cannot be supboenaed and sworn, even though he claim no privilege. * * * The party testifying may, in fact, be the defendant or the party proceeded against, and not a mere witness, although he be not under arrest or openly chaged with crime or proceeded against in name. The title of the proceedings cannot determine rights, as constitutional privilege is one of substance and not of form. If the person examined before the grand jury be in fact the one aimed at, sought for, and charged with the crime, the title of the proceedings cannot make his examination legal."

The reasoning is likewise found in *People* v. *Mondon*, 103 New York 211, 8 N.E. 496, and the court carrying through to a logical end said:

> "* * * It thus appears that when the prisoner was called upon to make his statements on oath before the coroner, he stood in the attitude of an accused person, and was required to answer for himself, *as a party, and not as a mere witness to aid the coroner in investigating the cause of the death of the deceased.* * * * From that time the prisoner accepted the same position of a person accused of crime, and his situation was similar to that of such a person before an examining magistrate, 'and although the tribunal might be different, yet, upon principle, his rights would be the same in both cases' (10 N.Y. 48, and in Teachout V. People

> (41 N.Y. 9), Woodruff, J., in commenting upon the cases of McMahon v. People (15 N.Y. 384), says: 'The coroner acting substantially in the place of any examining magistrate, and the fact that the prisoner was held under arrest without warrant, could not make his protection against such an inquisition less imperative; * * * '"

It therefore follows that as an accused, the petitioner would have the constitutional right as well as the statutory right to have counsel at every stage of the proceedings.

That the procedure under the Michigan one man grand jury statute is most unusual is emphasized by the fact that a witness testifying falsely before that body can under the decision of the Supreme Court be guilty at one and the same time of contempt of court for testifying falsely before that body as a court and guilty of perjury for testifying falsely before that body as a grand jury. The witness is thus placed in the position of being subject to double prosecution and double jeopardy for one and the same act. As stated by Mr. Justice Rutledge in his concurring opinion in *Re Oliver, supra:*

> "It takes away the security against being twice put in jeopardy for the same offense. * * * "

Even considering the tribunal as a "Court" it does not appear that the allegedly false testimony of the witness has impeded and embarrassed the administration of justice. In fact this court has on a number of times held that such false swearing cannot constitute contempt but must be punished by an independent proceeding for perjury.

The following quote from *in re Michael*, 326 U.S. 324, 66 S. Ct. 78, 90 L. Ed. 30, is apropos:

> "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore, it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of trial is to sift the truth

> from a mass of contradictory evidence, and to do so the fact finding tribunal must hear both truthful and false witnesses. It is in this sense, doubtless, that this court spoke when it decided that perjury alone does constitute an 'obstruction' which justifies exertion of the contempt power and there 'must be added to the essential elements of perjury under the general law of the further elements of perjury under the general law of the further element of obstruction to the Court in performance of its duty.'" Exparte Hodgings, supra, 249 U.S. 382, 383, 384, 39 S. Ct. 339, 340, 63 L. Ed. 656, 11 A.L.R. 33. And the Court added "the presence of that element (obstruction) must clearly be shown in every case where the power to punish the contempt is exerted."

It is submitted that these additional elements are not present in the matter of Lee Roy Murchison.

In *ex parte Hudgings*, 249 U.S. 378, 39 S. Ct. 337, 63 L. Ed. 656, the court said:

> "It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully, the power would retain to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result, and the freedom of the citizen, when called as a witness in a court, would be gravely imperiled."

The situation with respect to petitioner White is even more unusual. The record shows that White was adjudicated in contempt because of a refusal to testify on the ground that he required the advice of counsel. The statute

under which the grand jury was proceeding expressly provided that petitioner "shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt." (App. p. 26)

It does appear that White has been condemned for exercising a right granted to him by the legislature of the State of Michigan which at the time of his refusal to answer had not been the subject of adjudication by any courts of the State.

One of the essential elements of contempt of court is the element of bad faith, the intent to obstruct and impede the administration of justice. How the existence of such intent can be drawn from the respectful refusal to answer based upon a statutory right set forth in plain words is altogether adverse with several rules at law and constitution principles.

The last amendment act 276 P.A. 1951 of the State of Michigan (App. p. 26) was a deliberate and studied effort of the legislature to curtail the powers of the one man grand jury differentiating between his functions as prosecutor, investigator and judicial officer preventing him from sitting and trying as judge cases which he had investigated and prosecuted, and provided for the protection of persons brought into examination by allowing them the assistance of counsel.

CONCLUSION

From the history as set forth in the beginning of our argument as to the creation, operation and functioning of the one-man grand jury, we think that it logically follows that the co-mingling of functions as set forth in this brief in one individual is entirely inconsistent with our American form of Government. We believe it impossible for the Act to be put into effect without the violation of the constitutional rights of persons affected; and, therefore, urge this Court to declare same unconstitutional.

In the instant cases the decisions affecting the individuals involved are contrary to their basic rights under the 14th Amendment to the Constitution of the United States. The fact that the Michigan Courts could arrive at any such decisions under the Act, despite the clear chart given by the Legislature demonstrates the inherent unconstitutional possibilities underlying the Act and requires that same should be stricken from the Statute books.

Respectfully submitted,

COBB, HOWARD AND HAYES
Attorneys at Law
613 F Street, N.W.

By:

JAMES A. COBB
GEORGE E. C. HAYES
Counsel of Record
for the Petitioners

Of Counsel:
WILLIAM L. COLDEN
Attorney at Law
1308 Broadway
Detroit, Michigan

CHARLES W. JONES
Attorney at Law
1308 Broadway
Detroit, Michigan

APPENDIX

Sections 28.943-28.944: Michigan Statute Annotated: Callaghan's Pocket Supplement, 92-103

§ 28.943 Proceedings before trial; investigation of suspected offenses by judge of court of record; inquiry; witnesses; participants in inquiry, disqualification from appointment or election.] SEC. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, • [or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record] shall have probable cause to suspect that any crime, offense or misdemeanor • shall have been committed within his jurisdiction • [, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry: Provided, That in any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court. Thereupon such judge shall require such persons to attend before him as witnesses and answer such questions as such judge may require concerning any violation of law about which they may be questioned within the scope of the order;] and the proceedings to summon such [witness] and to compel [him] to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall • [not receive any compensation or remuneration other than witness fees as paid witnesses] in other criminal proceedings • [, and said witness shall not be employed in any capacity by the judge or by any person connected with such inquiry, within the scope of the said inquiry being conducted.] Whenever a subpoena shall be issued by the

[judge] conducting such inquiry, commanding the appearance of a witness before such [judge] forthwith upon the service of such subpoena, and, following the service thereof, such witness arrives at the time and place stated in such subpoena, the [judge] so issuing the same shall be [forthwith] notified of such [appearance] by the officer serving the subpoena, and it shall thereupon be the duty of such [judge forthwith] to appear and take the testimony of such witness •. [Any person called before the grand jury shall at *all times* be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. All matters so revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in said section. No testimony shall be taken or given by any witness except in the presence of the judge.]

Any [judge,] prosecuting [attorney] or special prosecuting [attorney,] or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of such inquiry: Provided, That such disqualification shall not extend more than [1] year from date of termination of such inquiry, as determined by final order of said [judge] entered prior to such date. •

§ 28.944 Same; apprehension of suspected person; disqualification of investigating judge in later proceedings; removal of public officers, procedure; disclosure of information, exceptions, penalty; report of no finding of criminal guilt; limitation of period of inquiry; inability to continue inquiry, appointment of successor judge.] SEC. 4. If upon such inquiry the [judge] shall be satisfied that any offense has been committed and that there is probable cause to supect any person or persons to be guilty thereof, [he] may cause the apprehension of such person or persons by proper process, and upon the return of such proc-

ess served or executed, the [judge] having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint: [*Provided, That the [judge] conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing* • *or the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 hereof* [, *except alleged contempt for neglect or refusal to appear in response to a summons or subpoena*]. And if upon such inquiry the [judge] shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance [in] office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said [judge] shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. • [Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before such judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state,] any [judge] conducting such inquiry, any prosecuting attorney and other persons who may at the discretion of such [judge] be admitted to such inquiry, who shall while [conducting such inquiry or while]

in the services of [such judge] or after his services with [such judge] shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in any such inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or [under] recognizance, or who shall disclose that any person has been questioned or [summoned] in connection with any such inquiry, or who shall disclose or publish or cause to be published any of the proceedings of such inquiry otherwise than by issuing or executing processes prior to such indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related thereto, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than [$1,000.00] or both such fine and imprisonment in the discretion of the court, and such offense when committed by a public official shall also constitute malfeasance in office. Upon the termination of such inquiry [if] the judge shall make no presentment of crime or wrong-doing as to any person or persons whose apprehension or removal from office he has not so caused, [he] may, in his discretion, [with the consent of the person who may be named,] file with the clerk of the county in which such inquiry has been conducted, a report of no finding of criminal guilt as to any person or persons involved in such inquiry, either as witness or otherwise, whose involvement in such inquiry has become public.

[No inquiry or proceeding hereunder shall continue longer than 6 months unless extended by specific order of the said judge or his successor for an additional period not to exceed 6 months.]

In the event any [judge] conducting such inquiry shall be unable to continue therein because of physical disability, disqualification, termination of office or death, the presiding circuit judge of Michigan shall appoint a successor.

§ 28.944(1) Same; secrecy of proceedings, exceptions, penalty.] SEC. 4a. It shall be unlawful for any person,

firm or corporation to possess, use, publish, or make known to any other person any testimony, exhibits or secret proceedings obtained or used in connection with any grand jury inquiry conducted prior to the effective date of this act, except in the manner specifically provided herein, and also excepting any information heretofore disclosed before any investigating committee of the Congress of the United States or any agency of the federal government. Any person violating the provisions of this section shall be guilty of a felony.

§ 28.945] Same; failure of witness to appear or answer questions; penalty. SEC. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such [judge] may require [as] material to such inquiry, shall be deemed guilty of a contempt and after a public hearing in open court and conviction of such contempt, shall be punished by a fine not exceeding [$1,000.00] or imprisonment in the county jail not exceeding [1 year] or both at the discretion of the court: Provided, That if such witness after being so sentenced shall [offer to] appear • [before such judge to purge himself of such contempt, the judge shall cause such witness to be brought before him and, after examination of such witness,] the [judge] may in [his] discretion commute or suspend the further execution of such sentence.

§ 28.945(1) Same; confidential and priviliged communications.] SEC. 5a. In any inquiry authorized by this act • communications between reporters [of] newspapers or other publications and their informants • [are hereby declared to be privileged and confidential. Any communications] between attorneys and their clients, between clergymen and [the] members of their respective churches, and between physicians and their patients • [are hereby declared to be privileged and confidential when such communications were necessary to enable such attorneys, clergymen, or physicians to serve as such attorney, clergyman, or physician].

§ 28.946 Same; incriminating answers of witness; granting of immunity to witness, procedure, secrecy, scope.] SEC. 6. No [witness] shall upon such inquiry be required to answer any questions, [or] shall be convicted for contempt upon refusal to do so, when the answers might tend to incriminate him. [A written order granting to such witness immunity from such incrimination may be entered by said judge pursuant to a written motion by the prosecuting attorney or other duly authorized representative of the state in such proceeding, which order shall set forth verbatim the questions which such witness refused to answer. A true copy of such motion and order shall be delivered to such witness before he shall answer such questions. The order granting immunity so made shall thereafter extend to all related questions which may thereafter be put to such witness until such judge advises the witness that said immunity no longer applies. All such questions and the answers thereto shall be reduced to writing under the direction of such judge and a true copy of such transcript, duly certified by such judge, shall be delivered to such witness as soon as practicable thereafter. The provisions for secrecy provided for in section 3 hereof shall apply to all copies of such motion, order and transcript so delivered to such witness except that the witness may be privileged to disclose the same to his attorney if such witness should thereafter be prosecuted for any offense directly or indirectly growing out of any testimony given by him in such inquiry. No person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him. No such order granting immunity shall extend beyond the scope of such inquiry, nor shall it extend beyond the particular questions set forth in any such motion, order or transcript.]

§ 28.946(1) Same; sealing and filing of docket, journal, reporters' notes, transcript and other records on termination of inquiry; secrecy; availability of transcript and record to witness in subsequent proceedings; destruction of

transcripts, notes and records.] SEC. 6a. On termination of any such inquiry lasting not more than 30 calendar days the docket, journal, reporters' notes, transcript and other record of such judge in such inquiry shall be sealed and filed with the clerk of the court having jurisdiction; and if lasting more than 30 calendar days shall be sealed and filed with the clerk of the supreme court of the state of Michigan, where it shall be held secretly in a separate container securely locked. Any person who shall violate the secrecy herein ordered as to such docket, journal, transcript and record shall be punished as provided in section 4 hereof. And the entire transcript and record as to any witness, and so far as material, including any grant of immunity, shall be available to such witness in connection with any appeal or other judicial proceeding where it may be relevant upon such witness filing a petition with the circuit could of the county in which he resides setting forth the proceeding for which such documents are sought and describing the portions of such transcript and record as to such witness only, which such witness requested for such appeal or proceeding; the judge of such circuit court shall issue an order upon the filing of such petition directed to the clerk of the supreme court of the state of Michigan or the clerk of the court, as the case may be, ordering such clerk to make available to such witness all such portions of the transcript and record as shall pertain to such witness and as set forth in the petition. The clerk shall immediately reseal the remaining transcript and records after compliance with such order. The petitioner shall execute to the clerk of the supreme court a receipt for such documents and such documents shall be returned to the clerk immediately upon the termination of such appeal or proceeding for which the same shall have been obtained: Provided, however, upon the petition of the prosecuting attorney of the county in which such inquiry was conducted, or any other interested person, any circuit judge, acting as such in said county, upon determining that there is no further need for preserving and retaining the same, shall

enter an order providing for the referring to the supreme court, for the entry of such order or orders as a majority of the court may at any time determine, for the destruction of said transcripts, notes and records, or any part thereof: Provided further, That no such order shall be entered by such circuit judge until at least 6 years after the termination of such inquiry.

§ 28.946(2) Same; accounting of monies disbursed, filing after termination of inquiry.] SEC. 6b. Within 90 days after the termination of such inquiry, such judge shall file with the clerk of the court having jurisdiction a public accounting of all monies disbursed by him or disbursed at his direction.

ARTICLE IV OF THE MICHIGAN CONSTITUTION OF 1908 DIVISION OF THE POWERS OF GOVERNMENT

Departments of Government. SECTION 1. The powers of government are divided into three departments: The legislative, executive and judicial.

Limitations of powers of officers. SECTION 2. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
NOV 10 1954
HAROLD B. WILLEY, Clerk

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1954

No. 405

In the Matter of

LEE ROY MURCHISON

In the Matter of

JOHN WHITE

On application for writ of certiorari to the Supreme Court of the State of Michigan.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

Frank G. Millard,
Attorney General
of the State of Michigan

Edmund E. Shepherd,
Solicitor General
of the State of Michigan

Daniel J. O'Hara,
Assistant Attorney General
Counsel for Respondent
Lansing 2, Michigan

FRANKLIN DEKLEINE COMPANY, STATE PRINTERS
LANSING, MICHIGAN 1954

Subject Index

		Page
I	Reference to official reports	1
II	Jurisdiction	2
III	Questions Presented	2
IV	Constitutional Provisions, and Statutes Involved	3
V	Counter-Statement of the Case and Issues Raised in State Courts	4
	In the Matter of John White	4
	In the Matter of Lee Roy Murchison	5
VI	Reasons for Opposing	10
VII	Conclusion	16

Table of Cases and Statutes Cited.

Black, In re, 47 F. 2d 542, 543 12

Courtney v. Lockett, 175 Kan. 704; certiorari granted, October 15, 1954, No. 179 16

Crowell v. Benson, 285 US 22, 57 ..... 3, 15

Dryer v. Illinois, 187 US 71, 84 ..... 3, 15

Highland Farms Dairy v. Agnew, 300 US 608, 612 ..... 3, 15

Murchison, In the Matter of, 340 Mich. 151, 65 N.W. 2d 296 ..... 1, 13

Oliver, In the Matter of, 333 US 257 ..... 15, 16

Slattery, In re, 310 Mich. 458; certiorari denied, 325 US 876 ..... 11, 14

White, In the Matter of, 340 Mich. 140, 65 N.W. 2d 301 ..... 1, 12

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1954

No. 405

In the Matter of

LEE ROY MURCHISON

In the Matter of

JOHN WHITE

On application for writ of certiorari to the Supreme Court of the State of Michigan.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

I

Reference to Official Reports.

Since the writ, if issued, would bring up for review only the final judgments of Michigan's highest court

In the Matter of White, 340 Mich 140, 65 NW 2d 301,

—and—

In the Matter of Murchison, 340 Mich 151, 65 NW 2d 296,

it cannot be said that review of the opinions of the court of original jurisdiction, is also sought by petitioners.

II

Jurisdiction.

a. We agree that final judgments of the Michigan Supreme Court were entered on the 6th day of July 1954.

b. Counsel also correctly summarize the proceedings which followed such decisions, and we concede that the petition for certiorari was timely filed.

c. Although jurisdiction of this Court is invoked under terms of 28 USC § 1257 (3), counsel fail to show any "special and important reasons therefor," nor do they demonstrate that the highest state court has decided a federal question of substance, Revised Rule 19 (1).

III

Questions Presented

Since none of the federal questions posed on page 3 of the petition, was necessarily decided by the Michigan Supreme Court, the only questions for immediate consideration are as follows:

1. Did the court of last resort decide a federal question of substance?

2. Have petitioners shown "special and important reasons" for review on certiorari of the opinions and judg-

ments of the Supreme Court of Michigan as required by Revised Rule 19 (1) ?

We respectfully submit that each of these questions should be answered in the negative.

IV

Constitutional Provisions, and Statutes Involved.

1. The "statute" here challenged comprises 8 sections of Chapter 7 of the Michigan Code of Criminal Procedure,[1] but the court below merely construed and applied it without testing its validity by any Federal constitutional principle. The weakness in petitioners' position lies in the fact that in the trial court White and Murchison invoked provisions of the very "statute" which they now attack on federal grounds.[2]

2. Article IV of Michigan's Constitution (1908), requiring division of the powers of government into the traditional three departments, and expressly forbidding invasion into either, as invoked by Murchison (M.R. 2, Petition, p. 65) and White (W.R. 3, Petition, p. 69), presented a non-federal question controlled by State law.[3]

---

[1] Michigan Code of Criminal Procedure, Chapter 7, §§ 3, 4, 4a, 5, 5a, 6a and 6b [Mich. Stat. Ann. (Henderson) 1953 Cum Supp §§ 28.943 28.946 (2)].

[2] Section 3 is invoked as authority for having counsel in the court room during the investigation, while § 4 is said to disqualify the judge from hearing the contempt charge.

[3] Dreyer v. Illinois, 187 US 71, 84; Crowell v. Benson, 285 US 22, 57; Highland Farms Dairy v. Agnew, 300 US 608, 612.

3. The Fourteenth Amendment was not involved in the decision of the court below.

V

Counter-Statement of the Case, and Issues Raised in State Court.

This counter-statement is deemed necessary in correcting inaccuracies and omissions in the statement of petitioners, Revised Rule 40 (3).

In the Matter of John White.[1]

1. The witness White, on examination (W.R. 50-60) before the judge assigned by the court of first instance to conduct the inquiry here in question (W.R. 1), not only declined to answer any questions unless his attorney was present in the court room; he also refused (W.R. 56) to state whether his counsel had accompanied him to court that morning or whether his attorney was "outside in the hall," or whether he had conferred with an attorney before coming to court (W.R. 56-57). And he further declined (W.R. 57) to name the lawyer whose presence he desired.

2. While the formal order (W.R. 13-14) issued in White, required the witness to show cause why he should not be punished for criminal contempt of court, the judge interpreted this language to mean that White was commanded to show "why he should not be adjudged guilty of contempt of court" (W.R. 85), an interpretation which White's

---

[1] Unless otherwise plainly indicated, numbers in parentheses preceded by initials "W.R." refer to pages of the typewritten record in the Matter of John White as certified by the clerk of the Michigan Supreme Court.

counsel did not dispute when opportunity afforded (W.R. 85, 88).

3. The order to show cause (W.R. 13) was met by White's counsel in open court by a motion to dismiss (W.R. 90) and a further motion (W.R. 90-91) to transfer the matter to another judge because of lack of jurisdiction in Judge O'Hara (W.R. 91).

While such motions, particularly that which sought dismissal of the order to show cause, were predicated in part upon constitutional grounds (W.R. 104, 105, 106, 109, 116), counsel, in the main, relied upon the terms, conditions and provisions of the statute here in question (W.R. 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 107, 108, 110). And so far as separation of powers of government was concerned, reliance was upon Article IV of the State Constitution, rather than upon Article 1, § 1 or Article IV, § 2 of the Constitution of the United States. It was urged, however, that if the judge's interpretation of the statute were correct (W.R. 111-116), "the entire act would be unconstitutional" (W.R. 116).

In the Matter of Lee Roy Murchison.[4a]

1. The order to show cause directed to Murchison (M.R. 12) was issued on the 6th day of May, returnable on the 10th day of May 1954 (M.R. 14).

2. Such order was based upon an alleged contempt of court committed by Murchison when on the 7th day of April 1954 "he had testified falsely by denying that he had

---

[4a] Unless otherwise plainly indicated, numbers in parentheses preceded by initials "M.R." refer to pages of the certified record in the matter of Murchison.

at any time, specifically on the 9th day of March 1954, visited the residence of . . . Edward Spencer" (M.R. 5, 6).

3. The following should be added to the statements set forth in the petition for certiorari, pp. 4, 5, 6 and 9:

The contempt hearings were held in open court. The front door of the court room was opened wide so that any person desiring to attend could do so. At various times during the hearings many attorneys and other persons were present in the court room, including representatives of the press (M.R. 8).

At the outset of the hearing in Murchison (M.R. 60), counsel challenged the right of the judge to proceed in the matter "because of a prohibition in the statute," and he insisted that the judge who had conducted the investigation as a grand juror should not act in special proceedings to hear and determine the question of contempt "because of the provisions of the statute regulating procedure and hearings of this nature," § 4 (M.R. 64). This objection, based upon the statute here in question, was pressed throughout the hearing conducted on the 10th day of May 1954 (M.R. 86, 128, 136, 137, 139).

It may be noted that the judge's adjudication of contempt of court was based not alone upon testimony adduced in the grand jury room, but upon further testimony taken in open court during the public hearing (M.R. 67-182).

At the close of testimony on May 10, 1954 (M.R. 129 et seq.), counsel for Murchison stated (M.R. 8) that if the matter were continued for a few days, he would produce witnesses from Shrewsbury, Ontario, Canada, "to prove Officer Murchison was at that place on March 9, 1954." The hearing was then adjourned to May 12, 1954, to give counsel

opportunity to present testimony on behalf of his client, but on May 12, when court reconvened, counsel offered various objections to the proceedings (M.R. 141-143), and stated he did not desire to offer any testimony on behalf of Officer Murchison (M.R. 8).

Counsel stated that in view of several circumstances (M.R. 142-143) including the fact that Murchison protested the proceedings

> "for the reason that for the grand juror to hear such order to show cause would be a violation of the provisions of the statute regulating the one-man grand jury,"

he declined to proceed further in the matter (M.R. 143). Legal arguments being invited by the court, counsel raised the following points:

(a) He contended the provisions of the statute disqualified the judge from presiding in any proceedings in the nature of a contempt growing out of his grand jury investigation, and he argued the matter at length (M.R. 144-146).

(b) The order to show cause, it was said, violated the Due Process Clause in that the respondent was not given an opportunity to have a formal indictment filed against him specifically setting forth the charges to be proved (M.R. 146), and this was the first intimation of a constitutional objection.[5]

(c) Counsel then stated (M.R. 146-147) his position to be as follows:

---

[5] We note, however, that this point of procedural due process is not pressed in the petition for certiorari.

"Third, that the court is without authority either by statute or any theory of the common law, to cite the respondent for contempt expressly in view of the provisions of the statute forbidding such action. And, of course, that the statute itself is unconstitutional in that it departs from the ordered scheme of personal liberty established by the bill of rights and in that connection, . . . this entire . . . act is in itself, in its very essence repugnant to our ideals of justice and due process of law, in that having these extraordinary powers granted by the statute, and reposing the authority in one person, it departs completely from the concept of grand jury investigations as known to the common law, and the provisions of the statute disqualify a judge from sitting in contempt proceedings, is no more or less that a restatement of what I contend has always been the law, that a grand jury or an investigation of this kind cannot try any issue growing out of that investigation."[6]

For the reasons assigned, counsel submitted that the court should disqualify himself from hearing the matter, discontinue the proceedings, and refer them to the presiding judge for assignment to some other judge for hearing (M.R. 148).

Counsel having read into the record (M.R. 148-149) the provisions of § 5 of the Act, the matter was adjourned to May 14, 1954 (M.R. 155).

When court reconvened on the 14th day of May, and after further testimony had been taken (M.R. 158-173), defense counsel again stated (M.R. 174) he had no testimony to offer and urged that a person "should be able to rely upon the plain, unequivocal language of the statute of his state."

---

[6] It is rather difficult to say whether in this instance, counsel is relying upon or attacking the validity of the statute in question.

The burden of showing such a statute to be in violation of the fundamental law is [he said] upon the party making such an assertion,[7] and, counsel added:

> "Therefore, the respondent, Lee Roy Murchison, relying upon the plain, unequivocal language of the One Man Grand Jury Statute . . . as to procedure in trials for contempt of such grand jury, again protests these entire proceedings as being in violation of the law in such cases made and provided."

Each of these petitioners having been adjudged guilty of contempt of court and being sentenced therefor, applications for leave to appeal to the Michigan Supreme Court, based upon concise statements of facts and proceedings certified by the trial judge, Michigan Court Rule 60 (2), were duly filed, considered and granted. Based upon such applications and concise statements,[8] the Supreme Court affirmed. Thereupon each appellant filed a motion for rehearing and a supporting brief; the State filed a brief in opposition; and the Court on September 8, 1954, denied the applications for rehearing. The pending applications for writs of certiorari followed in due course.

---

[7] What counsel apparently had in mind was the thought entertained by the judge and later expressed in a formal opinion (M.R. 52), that §§ 4 and 5 of the Act deprived courts of record of their inherent power to punish for contempt and that they were therefore unconstitutional.

[8] To facilitate a speedy hearing and determination of the cause, the Michigan Supreme Court waived the settlement and printing of a record on appeal and accepted the typewritten applications and concise statements in lieu thereof.

VI

Reasons for Opposing.

First: The Michigan Supreme Court did not decide a federal question of substance.

1. Throughout each hearing held in open court, counsel for the accused stressed one specific point: that under the terms of § 4 of the Act [Michigan Stat. Ann 1953 Cum. Supp. § 28.944], the judge conducting an inquiry was disqualified from "hearing any charge of contempt," and in printing the Act as an appendix to their petition for certiorari, p. 20, they italicize the language upon which they rely.

Only White contended that when examined as a witness he was entitled to the presence of counsel in the court room of the grand juror,[9] and, while he based his position in part (W.R. 104-106, 109, 116) upon the fundamental right of an accused in all criminal prosecutions "to have the assistance of counsel for his defense," as guaranteed by the 5th through the 14th Amendment,[10] he relied strongly, and in the main (W.R. 90-104, inclusive, 107, 108, 110), upon provisions of the Act found in § 3 [Michigan Stat. Ann. 1953 Cum. Supp. § 28.943] which read as follows:

---

[9]
Murchison when called before the grand juror asserted no right to counsel but testified freely concerning the subject matter of inquiry but, as later adjudged, perjured himself.

[10]
Counsel for White entered his appearance as attorney for the "witness" rather than the "defendant" (W.R. 89-90). From this and other significant facts it may be urged that the 5th and 14th Amendments do not apply to a "witness" called before a grand jury

"Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. All matters so revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in said section."

2. In concluding (Pet'n, p. 49) that those portions of § 4 of the Act which purport to deprive the court of power to try contempts arising from grand jury proceedings, are void because they constitute an undue interference with the inherent power of state constitutional courts to punish for contempt, the trial judge, in a written opinion filed in Murchison, (Pet'n, p. 28), and adopted by him in White (W.R. 111-112), held as follows:

(1) A grand juror is a judicial officer to whom an investigation is assigned by law (Pet'n, pp. 33-35).[111]

(2) The recorder's court of the City of Detroit possesses all of the constitutional, inherent powers of a circuit court to punish for contempt (Pet'n, pp. 35-39).

(3) The legislature of Michigan could not and by the Act did not deprive courts of records of their inherent power to punish for contempt when a restriction upon such power was attempted in § 4 of the Act (Pet'n, pp. 40-48).

(4) Even if §§ 4 and 5 of the Act, as tested by the State Constitution, are valid and binding on the recorder's court

---

[111] Citing In re Slattery, 310 Mich. 458; certiorari denied, 325 US 876.

of Detroit, they do not apply to the contempt involved in Murchison (Pet'n, pp. 48-49).

And in rejecting White's claim that under express terms of § 3 of the Act he was entitled to counsel in the court room of the grand juror when called upon to testify as a witness (W.R. 119-137), the trial judge merely construed the language of that section, thus passing upon no federal question although, in giving effect to the legislative intent, he did cite federal authority (W.R. 133-135),

In re Black, 47 F. 2d. 542, 543,

for the proposition that neither at a trial nor before a grand jury is a *witness*, as distinguished from an *accused person*, entitled to have the aid of counsel when testifying, for such a witness, in the words of Judge Augustus N. Hand, *In re Black, supra*, "is not entitled to be furnished with facilities for evading issues or concealing true facts." Such a witness does not come within the Sixth Amendment entitling the *accused* in all criminal prosecutions "to have the assistance of counsel for his defense."[12]

3. The Supreme Court of Michigan, in reviewing *White* (Petition, p. 54), 340 Mich 140, 65 NW 2d 296, considered only two questions.

(1) Is a judge of the recorder's court of the city of Detroit, sitting as a judge of the recorder's court under

---

[12] Under the express terms of § 3 of the Act, as applied to every witness who appeared before the grand juror in this cause, White had the right to counsel at any reasonable time or place except when testifying in the court room of the grand juror, nor will it be denied that whenever the grand juror was sitting, counsel for such witnesses were present in the corridor. White, however, refused (W.R. 56-57) to state whether his counsel were present in the hallway, or had accompanied him to court, or whether he had conferred with counsel before coming to court.

CLS 1952, § 767.3 (Stat Ann 1953 Cum Supp § 28.943) disqualified by the provisions of CLS 1952, § 767.4 (Stat Ann 1953 Cum Supp § 28.944) from citing a witness for contempt and, thereafter, hearing the contempt proceedings himself, where the alleged contempt arose in the course of a grand jury investigation in the presence of him as the grand juror?

(2) Is counsel for a witness called before a one-man grand jury entitled under CLS 1952, § 767.3 (Stat Ann 1953 Cum Supp § 28.943) to be present in the grand jury room during the testimony of his client?

The answer to each question was in the negative, and in coming to its conclusion upon the second issue the Court took into consideration

> "that a witness before a grand jury is not on trial for any offense and that secrecy is a paramount adjunct of a grand jury."

Nor did the Court think that the legislature intended, in enacting the Act,

> "that a witness not on trial for any offense was entitled to have an attorney at his elbow to advise him whether or not he should answer a question put to him. We are of the opinion that a witness was entitled to have legal counsel before or after being subpoenaed and prior to his being called as a witness, or at such other times in the discretion of the grand juror. We hold that a witness legally called to testify before a grand jury is not entitled to have an attorney with him when he is so testifying."

The Court, in *Murchison* (Petition, p. 49), 340 Mich. 151, 65 NW 2d 301, followed its opinion in *White*, holding

that the judge of the recorder's court was not disqualified to hear the charges of contempt, and further, that the testimony at the contempt hearing justified the finding of the recorder's court judge that Murchison had testified falsely in the grand jury. Since he testified freely in the grand jury, and obviously falsely, the constitutional issue that he could not be compelled to answer without a waiver of prosecution, was not involved.

We therefore respectfully submit that the Supreme Court of Michigan decided no federal question.

4. Nor can it be said that the questions presented, even though passed upon by the highest court of the State, possess substance.

a. It is first contended that in acting as a grand jury, the court was acting in an administrative and/or executive capacity, and that to combine these functions is in derogation of the State Constitution of 1908, Article IV. And, it is said (Petition, pp. 12-13), that whenever the question has been presented as to whether a grand jury inquiry is a judicial one, the courts have answered in the negative, and reliance is placed in part upon *In re Oliver*, 333 US 257, esp., the concurring opinion of Mr. Justice Rutledge.

The trouble with such an argument, however, is that it is based primarily upon a provision of the Constitution of the State of Michigan, Article IV, and not upon the Federal Constitution. Moreover, in construing the Act, the highest court of the State has held,

> *In re Slattery*, 310 Mich. 458,
> certiorari denied, 325 US 876,

that a grand juror acting under the Act is a judicial officer, not a prosecuting attorney, policeman or detective, and that

the Act does no violence to Article IV of the Michigan Constitution which provides for the division of powers of government into the three traditional departments.

We therefore submit that the question presented a problem controlled by state law,

Dryer v. Illinois, 187 US 71, 84;

Crowell v. Benson, 285 US 22, 57;

Highland Farms Dairy v. Agnew, 300 US 608, 612.

b. Counsel's next point (Petition, p. 14, par. 3), that the interpretation given to § 3 of the Act amounts to a denial of due process, is also predicated upon the premise that the grand juror should not exercise executive or administrative powers and therefore deserves no further consideration.

c. The final point (Petition, p. 15, par. 4) seems to be that the contempt proceedings held in camera violated the principles which guided this Court *In re Oliver*, 333 US 257.

The obvious answer is, of course, that the hearings on contempt charges were not held in camera and that the judge of the trial court was guided throughout by principles announced in the case of *Oliver*.

Each person accused of contempt was served with due notice of such hearing and he was informed of the nature of the offense; he had a public trial after reasonable opportunity to prepare therefor; he had the right to examine in a public court room the witnesses against him; he was accorded the right to testify in his own behalf, a privilege which he neglected; and each person so accused was rep-

resented by counsel throughout the proceedings in open court.[13]

Second: The petition in this cause fails to disclose any "special and important reasons" for granting the writ of certiorari. Revised Rule 19.

---

[13] It is this which distinguishes Courtney v. Lockett, 175 Kan. 704; certiorari granted Oct. 15, 1954, No. 179. There the petitioner was adjudged guilty of contempt without a public hearing. In re Oliver, 333 US 257.

VII

Conclusion

The record in this cause fails to reveal any federal question of substance decided by the highest court of the State of Michigan, or any special and important reason for granting a writ of certiorari to review the final judgment of the court below. For these reasons, we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully Submitted,

Frank G. Millard,
Attorney General
of the State of Michigan

Edmund E. Shepherd,
Solicitor General
of the State of Michigan

Daniel J. O'Hara,
Assistant Attorney General

Counsel for Respondent
Lansing 2, Michigan

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.
FILED
APR 8 1955
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 405

IN THE MATTER OF LEE ROY MURCHISON AND JOHN WHITE, PETITIONERS

BRIEF FOR STATE OF MICHIGAN, RESPONDENT

Thomas M. Kavanagh
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General

Counsel for Respondent
The Capitol
Lansing 2, Michigan

FRANKLIN DEKLEINE COMPANY, STATE PRINTERS
LANSING, MICHIGAN—1955

TABLE OF CONTENTS

		Page
I	Opinions Below	1
II	Jurisdiction	2
III	Constitutional Provisions and Statutes	4
IV	Questions Presented	6
V	Statement of the Case	7
VI	Summary of Argument	11
VII	The Argument	14
	Point One: Each petitioner, White and Murchison, was accorded due process consistent with In re Oliver, 337 U.S. 257, as distinguished from a recent Kansas Case	16
	Point Two: The Michigan 1-man grand jury law, so-called, is here applied, violates no concept of due process	21
	Point Three: Neither the statute here in question, as judicially construed, nor the Due Process Clause viewed in the light of the Sixth Amendment, accorded White the right to the presence of counsel when testifying as a witness in the court room of the judge	24
VIII	Conclusion	29
Appendix "A"—Pertinent section of Chapter 6 of Michigan Code of Criminal Procedure—"Examination of Offenders"		A-1

Page

Appendix "B"—Act 326 Local Acts of Michigan 1883, Chapter XII, §§ 1 and 11, continuing Recorder's Court of City of Detroit and defining its jurisdiction [Comp. Laws Mich. 1948, §§ 726.1, 726.11 (Stat. Ann—Henderson—§§ 27.3551, 27.3561)] A-3

Appendix "C"– Summary of Michigan's criminal procedure under her 'one-man grand jury system', its history and purposes A-4

INDEX TO CASES CITED

	Page
Avery v. Alabama, 308 U.S. 644	13
Betts v. Brady, 316 U.S. 455, 466	26
Camarota v. United States, 111 F2d 243; 38 A.L.R. 2d 239	20
Chandler v. Fretag, 348 U.S. 3	13, 26
Cobbledick v. United States, 309 U.S. 323	23
Cooke v. United States, 267 U.S. 517, 537	20, 23
Courtney et al. v. Schroeder, 348 U.S. 933 [No. 179, October Term 1954]	11, 16, 21
Crowell v. Benson, 285 U.S. 22, 57	22
DeMeerler v. Michigan, 329 U.S. 660	13, 26
Dryer v. Illinois, 187 U.S. 71, 84	23
Ex Parte Savin, 131 U.S. 267	20
Ex Parte White, 47 F2d 543	14
Gilmore v. United States, 129 F2d 199; cert den., 316 U.S. 661	14
Greenough v. Tax Commission, 331 U.S. 486, 497	25
Highland Farms v. Agnew, 300 U.S. 608, 612	22
House v. Mayo, 324 U.S. 42, 46	26
Murchison, In re, 340 Mich 151; sub nom. Appeal of Murchison, 65 NW2d 301	1
Offutt v. United States, 348 U.S. 11	23
Oliver, In re, 333 U.S. 257	1, 14, 15, 16, 21
People v. Bermel, 71 NY Misc., 356; 26 NY Cr. 47	26, 27
People v. Mondon, 103 NY 211; 8 N.E. 496	26, 27
Pickett v. Michigan, No. 319 Oct. Term 1954 (now pending)	15
Powell v. Alabama, 287 U.S. 45	13, 26
Richardson, In re, 247 N.Y. 401	22, 23
Ruben v. Welch, 159 F2d 493; cert den., 331 U.S. 867	14
Slattery, In re, 310 Mich. 458, cert den., 325 U.S. 876	12, 22, 23
White, In re, 340 Mich 140; 62 NW2d 296	1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 405

IN THE MATTER OF LEE ROY MURCHISON AND JOHN WHITE, PETITIONERS

BRIEF FOR STATE OF MICHIGAN, RESPONDENT

I

Opinions Below

The opinions of the court below are officially and unofficially reported as

In re White, 340 Mich 140; 65 NW2d 296;
In re Murchison, 340 Mich 151; sub nom.
Appeal of Murchison, 65 NW2d 301.

The opinions in Murchison (R. 107) and White (R. 183) also appear in the transcript of record.

II

Jurisdiction

a. The opinions (R. 107, 183) and judgments (R.111) of the Michigan Supreme Court in these consolidated cases, were handed down and entered July 6, 1954 and a motion for rehearing (R. 191-192) was denied (R. 206) on the 8th day of September. We therefore agree that the petition for certiorari, filed October 14, 1954, was timely.

b. While it is true that Murchison by timely objections challenged the qualifications of the judge to hear charges of contempt growing out of a grand jury inquiry which he was conducting, it should be noted that such objections (R. 34-37, 84-87, 89, 90, 102, 104) were, with a few exceptions (R. 86, 87, 89, 90), predicated almost entirely upon what counsel termed (R. 102, 104) "the plain, unequivocal language" of the 1-man jury law, § 4 of which reads in part as follows:

> "Provided, That the judge conducting the inquiry under section 3 of this act shall be disqualified from . . . hearing any charge of contempt under section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Noting the renewal of such objections on appeal to the Michigan Supreme Court (R. 2-3), counsel state that the latter, in its Murchison opinion, 340 Mich. 151 (R. 107), "failed to pass upon petitioner's claims that the contempt hearing before the trial judge constituted a denial of due process of law as required by the Fourteenth Amendment."

Likewise, in White, 340 Mich. 140 (R. 183), counsel in-

timate that the high court of Michigan deliberately by-passed the federal issues raised as to due process.

If the Michigan Supreme Court in Murchison failed to decide these federal questions, and if in White they were not squarely met, it was because in the trial court, counsel laid great stress upon their claim that the judge was disqualified by legislative mandate from hearing such charges of contempt, and because in White they also contended that under the express terms of § 3 of the act, as well as the Due Process Clause, the witness was entitled to the presence of counsel when testifying in the grand jury room.

On this latter question, however, the court in coming to its conclusion on White's claim, and in construing the statutory provision on which his counsel relied, took into consideration that a witness before a grand jury is not on trial for any offense. Therefore, it held, "a witness legally called to testify before a grand jury is not entitled to have an attorney with him when he is so testifying" (R. 191).

In our brief opposing the petition for certiorari in this cause, we contended, pp. 10-14, that the Supreme Court of Michigan decided no federal question and, we presume, in granting the writ this Court set at rest the question of jurisdiction. Be that as it may, however, we do not intend to quibble over this phase of the controversy and it is our intention to discuss the constitutional questions implicit in petitioners' brief.

III

Constitutional Provisions and Statutes

1. The constitutional provisions involved in the case, are correctly published in petitioners' appendix.

2. The Michigan 1-Man Grand Jury Law, so called, is not a separate and distinct statute but comprises 8 sections of the Michigan Code of Criminal Procedure which are published in petitioners' appendix to their brief. The correct citation, however, is as follows:

> Michigan Code of Criminal Procedure, Chap. 7, §§ 3, 4, 4a, 5, 5a, 6, 6a and 6b, as last amended by Pub. Acts Mich. 1951, No. 276 [Comp. Laws Supp. 1952, §§ 767.3-767.6 (b) (Mich. Stat. Ann.—Henderson—1954 Rev. §§ 28.943-28.946 (2))].

3. Although the word is frequently used in connection with this law, the 1-man grand jury procedure does not lead to an "indictment" and immediate trial but merely culminates in the issuance of a warrant authorizing the apprehension of an accused person in order that he may be brought before a magistrate for a preliminary examination to determine whether an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith. If the magistrate so finds, he "shall forthwith bind such defendant to appear before" a court of competent jurisdiction for trial.

We therefore publish as Appendix A, a true copy of §§ 1-5, incl., and § 13 of Chapter 6 of the Michigan Code of Criminal Procedure, captioned "Examination of Offenders" [Comp. Laws 1948, §§ 766.1-766.5 and 766.13 (Stat. Ann. 1954 Rev. §§ 28.919-28.923 and 28.931)].

4. It is also essential to a clear understanding of Michigan's criminal procedure, to note that the recorder's court of the city of Detroit operates under a local act of the legislature enacted in 1883,[1] which continued the office of recorder and recorder's court to have original and exclusive jurisdiction of all prosecutions and proceedings for crimes, misdemeanors and offenses arising under the laws of the state and committed within the corporate limits of the city of Detroit, except "in cases cognizable by the police court of the city of Detroit, or by the justices of the peace of said city."

Up to the year 1919, Detroit had two courts of criminal jurisdiction, the recorder's court, with jurisdiction over felonies, the old police court with jurisdiction over misdemeanors and possessing in its judges the powers of magistrates or justices of the peace.

In that year, however, the legislature passed "An Act to supplement existing laws providing for the establishment and maintenance of municipal courts of record and defining the jurisdiction of such courts" which, of course, included the recorder's court of the City of Detroit. Pursuant to this supplemental act, the police court of the city of Detroit was abolished, § 10, and all the powers, duties and jurisdiction thereof were thereafter performed by the recorder's court. Consequently, the duty of issuing warrants upon complaints, the hearing of misdemeanors, and the holding of preliminary examinations, passed from police judges and magistrates to the judges of the recorder's court.

---

[1]

Act 326 of Local Acts 1883, "An Act to provide a charter for the City of Detroit. .." Chapter XII, Recorder's Court [Comp. Laws Mich. 1948, § 726.1 et seq. (Mich. Stat. Ann. § 27.3551 et seq.)].

We are therefore publishing as Appendix B a schedule of pertinent sections of the acts aforesaid.

In order that the Court may have a clear understanding of Michigan's criminal procedure under her "one-man grand jury system," so-called, we are republishing as Appendix C, a summary thereof, its history and purposes, which appeared as Appendix "A" in our brief in the Oliver Case (333 U.S. 257, No. 215 Oct. Term 1947).

IV

Questions Presented

1. During the proceedings which culminated in orders adjudging petitioners guilty of contempt of court committed as witnesses before a judge conducting a judicial inquiry pusuant to the Michigan 1-man grand jury law, so-called, was each accused person accorded that measure of due process required by the Fourteenth Amendment and consistent with this Court's opinion *In re Oliver*, 333 U.S. 257 (No. 215, December Term, 1947)?

2. Is a judge of the recorder's court of the city of Detroit who is conducting a judicial investigation pursuant to the Michigan one man grand jury law, so-called, barred by the statute aforesaid as interpreted by the State's highest court, or by any concept of due process, from hearing charges against a witness for alleged contempt of said court?

3. When called upon to testify before a judge conducting such a judicial inquiry, is a witness entitled under the Sixth or Fourteenth Amendment "to have the assistance of counsel" in the court room where such proceedings are held, it appearing that under the provisions of § 3 of the

act, as construed by the Michigan Supreme Court, the legislature intended that a witness was entitled to legal counsel before or after being subpoenaed and prior to being called as a witness, or at such other times in the discretion of the judge?

V

Statement of the Case

In the Matter of John White:

Pursuant to Revised Rule 40, § 3, we point out the following omissions in petitioners' statement of the case:

1. We feel compelled to substitute the following for petitioner's account of the genesis of the grand jury inquiry, brief, p. 5:

During examination of a police officer as a witness in open court during the public hearing of contempt charges against White, it was stipulated between court and counsel (R. 71-72) that as a result of a raid upon certain premises located at 945 St. Josephats Court in the city of Detroit on March 15, 1954, gambling paraphernalia was seized, and a warrant was issued charging a conspiracy to violate the gambling laws. At the time of hearing the contempt charges, those so accused were awaiting trial.

Because of the nature of certain persons who were seen frequenting the place, there was a well-founded suspicion, "that there was an agreement between certain police of-

ficers and someone who was violating the law to violate the law."[21]

The fact that policemen were observed by officers of that department, going to the doors, in some cases going inside 945 St. Josephats Court, gave rise to the belief that the gambling operations conducted there were being conducted unmolested because the police who should have been interfering were being paid not to do so (R. 72).

For these reasons it followed that on the 16th day of March, 1954, the prosecuting attorney of Wayne County filed in the recorder's court of the city of Detroit a petition requesting "a judicial investigation into the operations of numbers syndicates and the relation of certain police officers therewith" (R. 133). The application was considered by the entire bench of the recorder's court and Judge O'Hara was selected to conduct the investigation. He proceeded so to do.

2. We should also add to counsel's statement, brief, p. 5, that the witness White not only declined to answer any questions unless his attorney was with him at all times, from the beginning to end (R. 138-142), but also refused, on like grounds, to state the name of his attorney (R. 140), whether his counsel had accompanied him to court that morning (R. 142), whether such attorney was outside in the hall, whether he had conferred with counsel before coming to court that morning, or to reveal the name of the attorney whose presence he desired in the court room. He gave no reason for refusing to answer this latter question (R. 142-143).

---

[21] This paragraph is couched in the commendably frank language of defense counsel who joined in the stipulation.

3. Another fact omitted from counsel's statement is that although the witness White was asked (R. 141) whether he had ever engaged in the numbers business, whether he had ever given any members of the Detroit police department any money, gift, or gratuity, or anything of value to influence their judgment or decisions, and like questions (R. 142), he claimed no privilege against self-incrimination either under the 5th Amendment or Article II, § 16 of the Michigan State Constitution.

4. It is also permissible to note that while the formal order (R.136) issued in White, required the witness to show cause why he should not be punished for criminal contempt of court, the judge interpreted its language as commanding the witness to show cause why he should not be adjudged guilty of contempt (R. 145, 146) and, after a hearing in open court, he adjudged the respondent guilty of that offense and having done so, pronounced sentence (R. 177).

5. Nor should it be overlooked that the hearings in the matter of White on May 24 (R. 181) and May 28, 1954 (R. 145) were held in open court. The doors of the court room were open and anyone who desired to come into the court room was privileged to do so. Petitioner was represented by counsel, and the press was also present in addition to other people (R. 181)

In the Matter of Murchison:

1. Here, as in White, although the witness was ordered (R. 7-8) to show cause why he should not be punished for contempt of court, both court (R. 31) and counsel (R. 84) interpreted its language to mean that the witness was required to "show cause why he should not be adjudged in contempt of the court for giving false answers to certain questions which were propounded to him in the grand jury

investigation." The quoted language (R. 84) is that of defense counsel.

2. The contempt hearings, as in White, were held in open court. The front door of the court room was opened wide so that any person desiring to attend could do so. At various times many attorneys and other persons were present in the court room, including representatives of the press (R. 31, 38).

3. At the outset of the hearing in Murchison, before testimony was taken, counsel challenged the right of the judge to proceed in the matter because of a prohibition in the statute, "because of the provisions of the statute regulating procedure and hearings of this nature" (R. 37). The court ruled that testimony would first be taken and legal arguments heard thereafter (R. 34-35).

Following testimony so taken on the 10th day of May, 1954 (R. 39-76), counsel requested (R. 76-82) and obtained an adjournment to May 12, in order that he might attempt to show through witnesses that on the 9th day of March the respondent Murchison was not in the city of Detroit but that he was at Shrewsbury, Ontario, Canada, although he hadn't been able to get the witnesses to substantiate his claim up to the present time. As soon as counsel had definite information, he would transmit it to the assistant prosecuting attorney (R. 77).

On May 12, when court reconvened (R. 83), counsel for Murchison stated that his client elected not to offer any testimony whatsoever. Legal arguments being invited by the court (R. 85), counsel raised the points specified in his statement. Adjournment was then had to the 14th day of May (R. 91) when further testimony was taken (R. 92-101).

Defense counsel then announced (R. 101-102) he had no testimony to offer and he wished to reiterate Murchison's position "that a person should be able to rely upon the plain, unequivocal language of the statute of his state," and he protested "these entire proceedings as being in violation of the law in such cases made and provided" (R. 102).

We would also add the undisputed fact that Murchison was a patrolman and member of the Detroit police department.

VI

Summary of Argument

1. Each petitioner when charged with a contempt of court alleged to have been committed as a witness during a judicial inquiry conducted by a judge of the recorder's court of the city of Detroit pursuant to the Michigan 1-man grand jury law, so-called, was accorded that full measure of due process consistent with this Court's opinion *In re Oliver*, 333 U.S. 257:[31]

a. He was advised of the charges against him.

b. He had a reasonable opportunity to meet them by way of defense or explanation.

c. He had the right to and was represented by able counsel who appeared at the hearing to cross-examine witnesses.

---

[31] Cf. Courtney et al. v. Schroeder, 348 U.S. 933 [No. 179, October Term 1954.]

d. He had a chance to testify and call other witnesses in his behalf, either by way of defense or explanation.

e. He had a hearing in open court.

2. In conducting an inquiry pursuant to said law, a judge is acting in a judicial capacity as conservator of the peace or magistrate with authority, when justified, to issue warrants of arrest, and he is neither a police officer, a detective, nor a prosecuting attorney, and he has no power to indict.[4]

No valid provision of the statute, as construed and viewed by the State's highest court, can operate to deprive such a judicial officer of inherent power to punish for contempt of court committed in his presence.

Moreover, in White, the judge was called upon to decide a question of law rather than fact,[5] while in Murchison, counsel filed no affidavit of prejudice nor did he claim at any time during the hearing in open court that the judge had actually prejudged the factual issues presented.[6] And, after offering so to do, counsel later refused to produce witnesses or place Murchison on the stand.

---

[4]

The highest court of the state has so construed the statute in view of Michigan's State Constitution, In re Slattery, 310 Mich. 458, cert. den., 325 U.S. 876.

[5]

The question in White was whether he was entitled to the aid of counsel when testifying as a witness.

[6]

Counsel relied in the main upon provisions of the statute (R. 37) rather than upon any claim of actual prejudice.

It therefore follows (a) that the Michigan 1-man grand jury law, as here applied, does not delegate to a judicial officer, power to exercise legislative, administrative or executive power, nor does it vest in a member of the executive department, authority to exert judicial powers, contrary to Article IV of the Michigan Constitution 1908; nor is this a federal question; and (b) that the law aforesaid, as here applied, violates no concept of due process assured by the Fourteenth Amendment.

3. Petitioner White, when called upon to testify as a witness before a judge conducting an inquiry pursuant to the Michigan 1-man grand jury law, so-called, was not entitled to have the assistance of counsel in the court room during the taking of his testimony:

a. The "assistance of counsel for his defence," as that phrase is used in the 6th Amendment, is deemed by this Court to be a right essential to that fair hearing which under the Federal Constitution, must be accorded one accused of a criminal offense,

DeMeerleer v. Michigan, 329 U.S. 660.

Such constitutional provisions were adopted for the purpose of abrogating the common-law practice under which persons accused of felony were denied such right, *Powell v. Alabama*, 287 U.S. 45, which extends from arraignment to final argument, *Avery v. Alabama*, 308 U.S. 644, and beyond that to a habitual criminal accusation, *Chandler v. Fretag*, 348 U.S. 3.

b. So far as we can ascertain from careful research, it is well established that a mere witness is not entitled

to have the aid of counsel when testifying either at trial or before a grand jury.[7]

c. The witness White, petitioner here, was not called before the judge conducting the inquiry, as a person accused of a specific crime, later to be tried by a petit jury, and, when asked certain questions he failed to assert any privilege against self-incrimination. Moreover, although instructed by the judge that if there were any questions upon which he felt that he needed the advice of counsel, and it were done reasonably and not in such a way as to cause delays, he would be permitted to go out and talk to his attorney, he failed to exercise the privilege (R. 138-139).

VII

The Argument

Introductory

We would, at the outset, endeavor to clear up certain misapprehensions of Michigan's 1-man grand jury system, so-called, explicit in petitioners' "history" thereof, brief, (pp. 10-12):

1. Counsel state, p. 10, that "the effect of such legislation was to vest in a single individual (judges of courts of record, police judges and justices of the peace) the power to investigate crime and issue indictments as a result of such investigation. The effect of such legislation resulted in much litigation and attendant criticism."

---

[7] Ex parte White, 47 F2d 543, per Judge Augustus N. Hand. And please examine Gilmore v. United States, 129 F2d 199, cert. den., 316 U.S. 661; and Ruber v. Welch, 159 F2d 493; cert. den., 331 U.S. 867.

a. The investigating jurist,[8] however, possesses no authority to issue indictments, and ultimate power conferred by the act is fully expended upon issuance of a warrant for the arrest of the accused. Following execution of such a warrant, the respondent is brought before a magistrate to be accorded a preliminary examination to determine whether a crime has been committed and whether there is probable cause to believe that the accused is guilty thereof; if the magistrate so finds, the defendant is then bound over for trial.[9]

b. Quoting the prevailing opinion of this Court in *Oli[illegible]* U.S. 257, 263, counsel note that secret interrogations can be carried on day or night, in a public place or a "hideout," a courthouse, an office building, a hotel room, a home, or a place of business; and that " 'so well is this ambulatory power understood in Michigan that the one-man grand jury is also popularly referred to as the 'portable grand jury' ".

While in the administration of this law, abuses *may* have occurred on rare occasions in the past,[10] it is not true that in this particular case, secret interrogations were carried on night or day, in any place other than the official

---

[8]

As amended by Pub. Acts Mich. 1951, No. 276, § 3 of the 1 man grand jury law vests such power in "any judge of a court of law and of record," not minor judicial officers.

[9]

Please see Appendix "A" and Appendix "C," post.

[10]

In Pickett v. Michigan, No. 319 Oct. Term 1954, now pending on application for certiorari, while the circuit judge conducted a "portable" investigation, such irregularities, or so we contend, were not reflected on the subsequent preliminary examination and trial.

court room of the investigating jurist. Indeed, the inference from the record is fair that witnesses were examined in the court room with full opportunity to consult counsel who congregated in the hallways (R. 138-139).

> c. Counsel further say, br., pp. 11-12, that in its decision the Michigan Supreme Court returns to the original idea of an investigating and executive official arriving at a purported judicial conclusion and pronouncement in camera, and that "the issuance of an order to show cause after a so-called judicial finding is a farcical attempt to pay homage to the Due Process Clause."

It is our position that the judge in the case at bar issued his order to show cause (R. 7, 136) merely for the purpose of fairly apprising the accused witnesses of the precise nature of the charges of contempt of court preferred against them, that he made no final judicial determination of their guilt, that he held no proceedings in camera on the issues of contempt, and that the word "punish," instead of the word "adjudge," has been exaggerated far beyond the judge's original intent.

Point One

Each petitioner, White and Murchison, was accorded due process consistent with In re Oliver, 337 U.S. 257, as distinguished from a recent Kansas Case.[11]

In *Oliver, supra*, after petitioner had given certain testi-

[11]

Courtney et al. v. Schroeder, 348 U.S. 923, where the judgment was reversed in contempt proceedings under the inquisitory law of Kansas, and the case remanded for proceedings not inconsistent with the opinion in Oliver.

mony, the circuit judge, acting in the belief that his testimony was false and evasive (which belief was based partly on testimony given by at least one other witness in petitioner's absence), summarily charged him with contempt, convicted him, and sentenced him to sixty days in jail. These proceedings were secret and petitioner had no opportunity to secure counsel, to prepare his defense, to cross-examine the other grand jury witness, or to summon witnesses to refute the charge against him.[12]

This Court held: (1) the secrecy of petitioner's trial for criminal contempt, and (2) the failure to afford petitioner a reasonable opportunity to defend himself against the charge of giving false and evasive testimony, was a denial of due process. As so clearly stated by Mr. Justice Black in the prevailing opinion, 348 U.S. at 272, in the case before the Court,

> "the petitioner was called as a witness to testify in secret before a one-man grand jury conducting a grand jury investigation. In the midst of petitioner's testimony the proceedings abruptly changed. The investigation became a 'trial,' the grand jury became a judge, and the witness became an accused charged with contempt of court—all in secret. Following a charge, conviction and sentence, the petitioner was led away to prison—still without any break in the secrecy. Even in jail, according to undenied allegations, his lawyer was denied an opportunity to see and confer with him. And that was an end of the secrecy."

Unlike Oliver in the case from Michigan, or Courtney and others in the case from Kansas, 348 U.S. 933, the in-

---

[12]
We paraphrase the basic headnote In re Oliver.

vestigation conducted by Judge O'Hara never became a trial in camera nor did Murchison or White become an accused until he had been cited into court on contempt charges. Moreover,

(1) each petitioner was advised of the charges against him (R. 7, 136).

Counsel, of course, noting the peculiar language of each order to show cause, point to this as our Achilles heel, but the orders, as drafted, become vulnerable only when overemphasis is placed upon the court's command that each witness "show cause why he should not be *punished* for criminal contempt of this court because of his aforesaid acts." And from such a premise, counsel argue that the investigating jurist prejudged the guilt of each petitioner, convicted him during a secret session, and thus deprived him of due process. While the precise language of the court's mandate is perhaps unfortunate, it nevertheless expresses the judge's true intent. As we view the record, the sole purpose of the order to show cause was to inform the petitioner, with scrupulous care, of the specific charges of contempt preferred against him. Certainly it was not the purpose or intent of the judge to find the accused guilty of contempt, then bring him in to admeasure punishment.

In the case of White, the only question presented was one of law: whether he was entitled to the aid of counsel in the court room. In the case of Murchison, issues of fact were involved and the accused was afforded every possible opportunity to aid the court in resolving them in his favor. But his counsel failed to call his client to the stand and, after offering to produce such alibi witnesses as might be available (R. 76-82), and having obtained a continuance for that express purpose, he bluntly refused, on the adjourned date, to adduce any testimony whatsoever (R. 83).

Nor can we find any positive statement from defense counsel to the effect that they considered the judge to be disqualified because of actual prejudice on his part and, so far as we can ascertain, any claim that he was disqualified to hear the charges of contempt, was based primarily upon the provisions of the 1-man grand jury law itself (R. 37, 101, 102).

Moreover, when the case of Murchison was called for hearing, the judge stated (R. 31), without contradiction from defense counsel, that the matter then before the court had been brought in by an order to show cause why Murchison "should not be *adjudged* guilty of criminal contempt for giving false answers to questions asked of him . . .". And on the occasion of an adjourned hearing, held May 12, 1954 (R. 83), defense counsel himself gave a similar interpretation of the order to show cause.[13] And in the matter of White, when called for hearing, the court in the presence of defense counsel twice asserted (R. 145-146) that he had before him the order requiring White to show cause "why he should not be adjudged guilty of contempt of court," in which statement it is quite apparent, counsel acquiesced for he immediately stipulated (R. 146) that a complete transcript of the testimony of White might be received in evidence as an exhibit.[14]

And finally, while on this subject, it might be noted that while in cases of contempt due process requires "that the

---

[13]

Counsel stated (R. 84) that the order directed to respondent Murchison commanded that he appear "and show cause why he should not be adjudged in contempt of the court."

[14]

Although this was the point at which to object to the wording of the order to show cause, counsel let the opportunity go by without disputing the judge's interpretation thereof.

accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation,"[15] this is not to say that the proceedings must take any particular form so long as the substantial rights of the accused are preserved."[16]

(2) Following the essentials of due process specified in Oliver, supra, each petitioner also had reasonable opportunity to meet such charges by way of defense or explanation; he had the right to engage counsel and he was represented by lawyers of high standing at the bar, who appeared at the hearings, argued points of law, and, in the case of Murchison, subjected witnesses to rigorous cross-examination.

(3) Murchison, of course, had a chance to testify and call other witnesses, but, as we have seen, he chose to forego that privilege, failed to take the stand in his own behalf, and neglected to produce other witnesses. Hence, it follows that the testimony of police officers who said they saw him at the place of gambling activities, remained undisputed and consequently the judge had no testimony to weigh.

(4) It also lies beyond the peradventure of a doubt that

---

[15]

Chief Justice Taft in Cooke v. United States, 267 U.S. 517, 537.

[16]

Camarota v. United States, 111 F2d 243; 38 A.L.R. 2d 239, note; certiorari den., 311 U.S. 651. Citing inter alia, Ex Parte Savin, 131 U.S. 267, where it is said (probably obiter dictum) that in cases of misbehavior of which the judge cannot have personal knowledge and is informed thereof only by the confession of the party, or by the testimony under oath of others, "the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Blk. Comm. 286."

all hearings on such contempt charges were held in open court, both public and press being admitted (R. 31, 38, 181).

In the recent cause of *Courtney et al. v. Lockett*, No. 179 October Term, 1954, 348 U.S. 933, witnesses subpoenaed to testify at a secret inquisition proceeding held under the laws of Kansas, were accused of direct contempt of court and tried, sentenced and committed to jail without interruption of the secrecy. Three days after oral argument, this Court reversed the judgment and remanded the case "for proceedings not inconsistent with the opinion of this Court *In re Oliver* . . . "

We respectfully submit that since the petitioners in the pending cause were fully informed of the charges against them, had counsel, and their day in open court, the proceedings which led to their conviction were consistent with *Oliver* and it cannot be said that they were denied due process of law.

Point Two

The Michigan 1-man grand jury law, so-called, as here applied, violates no concept of due process.

Article IV of the Michigan State Constitution, § 1, divides the powers of government into the traditional 3 departments, legislative, executive and judicial, and provides, § 2, that no person belonging to 1 department shall exercise the powers properly belonging to another.

Petitioners contend that in acting as a grand juror, the judge was acting in an administrative and/or executive capacity, and that to combine these functions is in derogation of the constitutional provisions aforesaid. And it is said that whenever the question has been presented as to

whether a grand jury inquiry is a judicial one, the courts have answered in the negative.

The first trouble with such an argument, of course, when addressed to this Court, cannot be based upon the Federal Constitution but is a problem controlled by state law.

Dryer v. Illinois, 187 US 71, 84;

Crowell v. Benson, 285 US 22, 57;

Highland Farms Dairy v. Agnew, 300 US 608, 612.

Moreover, the highest court of the State has held,

In re Slattery, 310 Mich 458; cert. den., 325 US 876,

that a grand juror proceeding under this act is a judicial officer, not a prosecuting attorney, policeman or detective, and that the statute in question does no violence to Article IV of the State Constitution.

The Michigan statute, in operation, is not subject to the condemnation of Judge Cardozo leveled upon the proceedings involved

In re Richardson, 247 N.Y. 401.

As noted in the opinion written by Mr. Justice Butzel In the case of *Slattery, supra,*

> "The sole issue in the *Richardson Case* was whether a New York statute which provided that the governor of New York, in a proceeding before him for the removal of a public officer, might as governor take the evidence, or at his option direct that the taking of proofs be delegated to a judicial officer or commissioner for the purpose of taking testimony and reporting his findings to the governor. The law was held

to be unconstitutional on the ground that it was a delegation of the administrative powers to the judiciary."

This rule cannot be applied to Michigan's 1-man grand jury proceeding, however, for under that act as under the Federal system, the proceeding before a grand jury constitutes a judicial proceeding, *Cobbledick v. United States*, 309 U.S. 323.

Furthermore, under Michigan's system, justices of the peace, circuit judges and justices of the Supreme Court are deemed conservators of the peace within their respective jurisdictions. Const. Mich. 1908, Article VII, § 18.

Petitioners here, as did counsel in *Slattery, supra*, probably claim that the office of conservator of the peace is a different position from that of a judicial officer. But the Michigan Supreme Court in the case of *Slattery* set the question at rest, 310 Mich. at 466. And it should be observed that Judge Cardozo *In re Richardson*, 247 N.Y. at 412, pointed out by way of analogy that a magistrate before whom there is laid an information of the commission of a crime, conducts a *judicial inquiry* when after finding that a crime has been committed, and that there is reasonable cause to believe that the defendant has committed it, he issues a warrant of arrest.

Counsel in their zeal intimate that the judge who conducted the hearings on contempt charges had prejudged the case and made a predisposition. There is not the slightest foundation for such an accusation,[17] nor do the cases cited sustain counsel's position which seems to be that Judge O'Hara should have transferred the cause to

---

[17]

Counsel's charge of judicial prejudice is based almost entirely upon the language of the order to show cause heretofore discussed.

another judge of the same court. But this Court has applied such a rule or precept only in exercise of its supervisory authority over the administration of criminal justice in the federal courts, and then only when an accused's conduct cannot fairly be considered apart from that of the trial judge, or where the issue between the judge and the parties has come to involve marked personal feeling that does not make for an impartial and calm judicial consideration and conclusion,

Cooke v. United States, 267 U.S. 517, 530;

Offutt v. United States, 348 U.S. 11.

We respectfully submit that the law of Michigan, as here applied, violates no concept of due process.

Point Three

Neither the statute here in question, as judicially construed, nor the Due Process Clause viewed in the light of the Sixth Amendment, accorded White the right to the presence of counsel when testifying as a witness in the court room of the judge.

In our summary of the argument we have cited a few outstanding decisions to support our position that one is not entitled as of right to the presence of counsel when testifying as a witness rather than as an accused person, either at a trial of another or before a grand jury. This, we have noted, becomes clearly apparent in the light of the express language of the Sixth Amendment and its history.

Counsel for White contend, in the first place, that the Michigan Supreme Court distorted the language of the 1-man grand jury law, § 3, by giving its unambiguous

language an unjustifiable interpretation when it held, 340 Mich. at 150, that it meant "that a witness might consult with legal counsel, but (it) did not intend that a witness had the right to have his lawyer sit in the courtroom while the witness was testifying."

The proviso of the section of the law on which petitioner relies, reads as follows:

> "Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt."

In coming to its conclusion upon this issue the court took into consideration that a witness before a grand jury is not on trial for any offense, and it did not think that the legislature intended that a witness not on trial for any offense was entitled to have "an attorney at his elbow to advise him whether or not he should answer a question put to him." It was concluded that the legislature intended that a witness was entitled to have legal counsel before and after being subpoenaed and prior to his being called as a witness, or at such other times in the discretion of the grand juror.

This Court has said, *Greenough v. Tax Commission*, 331 U.S. 486, at 497:

> "State courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so adjudging, they are the final authority upon the meaning of their state law. It is only in circumstances where their judgments collide

with rights secured by the Federal Constitution that we have power to protect or enforce the federal right."

We respectfully submit that in the present circumstances it cannot be said that Michigan's interpretation of its own law collides with rights secured by the Federal Constitution, *viz.*, the right to the assistance of counsel for the defence of an accused person, Sixth Amendment, or such kindred right as may be secured by the Due Process Clause of the Fourteenth.

Counsel seem to concede that if White were merely a witness before the grand juror, he might not be entitled to the presence of his counsel in the court room. But, they urge, since the grand jury was established for the purpose of investigating the operation of numbers syndicates, and since White when called as a witness was specifically interrogated "in a manner definitely directed to establishing his criminal connections with the offense involved," he was immediately placed in the position of a potential defendant "and as such a potential defendant he was entitled to the benefit of the constitutional guarantees of due process," including the right to counsel. And they cite among others the following decisions said to support them in their position:

Powell v. Alabama, 287 U.S. 45, 68, 70;

People v. Bermel, 71 NY Misc. 356; 26 NY Cr. 47;

People v. Mondon, 103 N.Y. 211; 8 N.E. 496.

Decision in the case of *Powell, supra,* like those in many others to follow,[18] was predicated on the proposition

---

[18] E.g., Betts v. Brady, 316 U.S. 455, 466; House v. Mayo, 324 U.S. 42, 46; DeMeerleer v. Michigan, 329 U.S. 660; and, the latest expression of the rule, Chandler v. Fretag, 348 U.S. 3.

that the constitutional right of an accused to be heard, includes the right to be heard by counsel *when charged with crime.*

The case of *Bermel, supra,* is readily distinguished from the case at bar. There a defendant in a criminal action was subpoenaed and compelled to be a witness against himself before the grand jury which indicted him for perjury in having previously sworn falsely before another grand jury. It was held that his constitutional rights were invaded and the indictment must be dismissed, but with direction that the charge of perjury be submitted to another grand jury. And the court, pointing a distinction, stated that if the person testifying is a mere witness, he must claim his privilege on the ground that his answers will incriminate him, whereas, if he be in fact the party proceeded against, he cannot be subpoenaed and sworn even though he claim no privilege.

In *People v. Mondon, supra,* 103 N.Y. 211, 8 N.E. 486, a conviction of murder in the first degree was reversed for error in the introduction in evidence of statements made by the accused, an ignorant Italian laborer, at a coroner's inquest shortly after his arrest as the suspected murderer.

The distinction is perfectly obvious for in the case of *White* the witness was not charged with a crime and when called to the stand he did not immediately step into the role of an accused person. Even before any pertinent questions were asked, he took the firm position that he would not under any circumstances answer questions until his counsel was present in the court room. He knew, or should have known, that he would be entitled to immunity from prosecution if he claimed his privilege against self-incrimination. The fair inference is that his counsel was as a matter of fact within reach in the corridor of the court

and he was given the chance to consult him if he so desired. He not only declined to answer any questions unless his attorney was present in the court room; he also refused to state whether his counsel had accompanied him to court that morning or whether his attorney was "outside in the hall," or whether he had conferred with an attorney before coming to court, and he further declined to name the lawyer whose presence he desired. In short, this witness was guilty of bad faith throughout his entire examination.

In contending that White was entitled to counsel, a point is raised, brief, p. 22, which was not clearly presented in the trial court or on appeal, so far as we have been able to ascertain. Of course, as counsel state, to constitute contempt through perjury, it must also appear that the false testimony of the witness obstructed the administration of justice. The answer is, however, that both White and Murchison obstructed the grand jury proceedings, Murchison by giving false testimony, White by refusing to answer any questions.

VIII

Conclusion

For the reasons assigned in this brief, we respectfully submit that the final judgments of the Michigan Supreme Court should be affirmed.

Respectfully Submitted,

Thomas M. Kavanagh
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General

Counsel for Respondent
The Capitol
Lansing 2, Michigan

Appendix "A"

Pertinent section of Chapter 6 of Michigan Code of Criminal Procedure "Examination of Offenders."

"**Sec. 1.** The state and accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination." [Michigan Stat. Ann. (Henderson) § 28.919].

"**Sec. 2.** Whenever complaint shall be made to any magistrate named in section one [1], chapter four [4], of this act, that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him." [Michigan Stat. Ann. (Henderson) § 28.920].

"**Sec. 3.** If it shall appear from such examination that any criminal offense not cognizable by a justice of the peace has been committed, the magistrate shall issue a warrant directed to the sheriff, chief of police, constable or any peace officer of the county, reciting the substance of the accusation and commanding him forthwith to take the person accused of having committed such offense and to bring him before such magistrate to be dealt with according to law, and in the same warrant may require such officer to summon such witnesses as shall be named therein." [Michigan Stat. Ann. (Henderson) § 28.921].

"**Sec. 4.** The magistrate before whom any person is brought on a charge of having committed an offense not cognizable by a justice of the peace, shall set a day for

examination not exceeding ten [10] days thereafter, at which time he shall examine the complainant and the witnesses in support of the prosecution, on oath in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such magistrate may deem pertinent." [Michigan Stat. Ann. (Henderson) § 28.922].

"**Sec. 5.** If it shall appear that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail be offered, or the offense be not bailable by the magistrate, the prisoner shall be committed to jail for trial." [Michigan Stat. Ann. (Henderson) § 28.923].

"**Sec. 13.** If it shall appear to the magistrate upon the examination of the whole matter, either that no offense has been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate upon the examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith, said magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial." [Michigan Stat Ann. (Henderson) § 28.931].

Appendix "B"

Act 326 Local Acts of Michigan 1883, Chapter XII, §§ 1 and 11, continuing Recorder's Court of City of Detroit and defining its jurisdiction [Comp. Laws Mich. 1948, §§ 726.1, 726.11 (Stat. Ann. Henderson §§ 27.3551, 27.3561)]

"Section 1. The office of recorder and the recorder's court of the city of Detroit shall continue as heretofore created and established, except as herein otherwise provided. The present recorder and associate judge of said court shall respectively continue in office until January ninth [9th], eighteen hundred and ninety-four [1894]." [Comp. Laws Mich 1948 (Stat. Ann Henderson § 27.3551)].

"Sec. 11. The said recorder's court shall have original and exclusive jurisdiction of all prosecutions and proceedings in behalf of the people of this state, for crimes, misdemeanors, and offenses arising under the laws of this state, and committed within the corporate limits of the city of Detroit, except in cases cognizable by the police court of the city of Detroit, or by the justices of the peace of said city, and shall have power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, and to do all acts which the circuit courts of this state, within their respective jurisdictions, may, in like cases, issue and do by the laws of this state: Provided, That this section shall not be construed to prevent the grand jury for the county of Wayne from inquiring into and presenting indictments, as heretofore, for crimes and offenses committed within the limits of said city." [Comp. Laws Mich 1948, (Stat Ann Henderson § 27.3561)].

Appendix "C"

Summary of Michigan's criminal procedure under her 'one-man grand jury system', its history and purposes.

For a clear understanding of the true function of Michigan's one-man grand jury it is essential to consider: *(1st)* her early relinquishment, State Const. 1850, article 6, § 28, of a constitutional guaranty, State Const. 1835, article 1, § 11, that 'no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury'; *(2nd)* the special proceedings drawn in question here, authorized by law for extraordinary occasions,[1] in which a judge of a court of record constitutes himself a one-man grand jury to investigate suspected criminal offenses by examining material witnesses;[2] and *(3rd)* some of the purposes for which this law has been invoked by the State.

---

[1]

We lay aside any consideration of Michigan criminal procedure in due course for magisterial investigation of specific complaints charging offenses not cognizable by a justice of the peace, for the arrest of offenders, for the conduct of a preliminary examination, and for the filing of an information. Mich. Code of Criminal procedure, chapters 6 and 7, Comp. Laws Mich. 1948, § 766.1 et seq. and § 767.40 [Mich. Stat. Ann-Henderson-1954 Rev. § 28.919 et seq. and § 28.980].

[2]

Idem., Chap. 7, §§ 3-6 [Mich. Comp. Laws 1952 Supp. §§ 767.3-767.6b (Stat. Ann. 1954 Rev. §§ 28.943-28.946 (2)].

1

Abolishment of traditional grand jury.

Article 1, § 11, of Michigan's first Constitution (1835), following somewhat the pattern of the 5th Amendment to the Federal Constitution, guaranteed that no person should be held for a criminal offense 'unless on the presentment or indictment of a grand jury', except in specified instances; but the Constitution of 1850, article 6, § 28, and Michigan's present Constitution (1908), article 2, § 19, omitted that requirement, and substituted therefor the 'right to be informed of the nature of the accusation'.[13]

> "In 1859 the regular calling of grand juries was dispensed with and provisions were made for prosecuting offenders by means of informations filed by the prosecuting attorney, although the grand jury was preserved as an institution of the court, to be invoked by the circuit judge if conditions should warrant".[14]

[13]

This section of Michigan's bill of rights also guarantees inter alia 'a speedy and public trial', the right 'to be confronted by the witnesses', 'to have compulsory process', and to 'have the assistance of counsel'.

[14]

The author of this statement observes by way of foot note that the Michigan legislature in 1933 (Act No. 284) provided for a permanent grand jury in every county of 70,000 population and upward, to meet twice in each year; and that in a little over one year, it appeared that the plan was not a success, and the statute was repealed (Act No. 31 Pub. Acts Mich. 1933).

Gillespie's Criminal Law and Procedure, 1st Ed., Vol. 1, § 99, pp. 101-102.

The present law of Michigan[5] prohibits the drawing of grand juries unless the judge shall so direct.[6]

2

The Michigan 'One-man Grand Jury'.

The Michigan Code of Criminal Procedure, chap. 7, §§ 3-6, incl.,[7] reenacts Act. No. 196, Pub. Acts 1917, as amended, the history of which is as follows:[8]

> "After 1859 the 23-man Grand Jury Statute was not repealed, but became an extraordinary instrument

---

[5]

Section 7 of chapter 7 of the Michigan Code of Criminal Procedure provides that 'grand juries shall not hereafter be drawn, summoned to attend at the sittings of any court within this state, . . . unless the judge thereof shall so direct by writing under his hand, and filed with the clerk of said court' (Mich. Comp. Laws 1952 supp. 5767.1 [Mich. Stat. Ann. § 28.947]).

[6]

This discretion is seldom exercised, for in Michigan the 'one-man grand jury' has in recent years taken the place once occupied by the traditional 16-member grand jury. People v. McCrea, 303 Mich. 213 (cert. denied, 318 U.S. 783); People v. Roxborough, 307 Mich. 575 (cert. denied 323 U.S. 749; and In re Slattery, 310 Mich. 458 (cert. denied, 325 U.S. 876).

[7]

Mich. Comp. Laws, Mich. Stat. Ann. §§ 28.943-28.946.

[8]

The quotation is from the majority report of a special committee of the Michigan State Bar. September 1947 issue of Michigan State Bar Journal, pp. 55-62, at p. 58.

called into use only occasionally, and then for the purpose of investigating widespread corruption, usually of an official character.

In 1885 a Michigan statute establishing the Detroit police court gave inquisitorial powers to police magistrates of a similar character to the one-man grand jury. In 1915 a Committee on Law Reform of the Michigan State Bar Association recommended the appointment of a Special Committee on Criminal Law and procedure. This Special Committee . . . concentrated its efforts on certain specific improvements in criminal procedure, and recommended a bill for the institution of proceedings for the discovery of crime, which was published as a part of the proceedings of the Michigan State Bar Association Journal in 1916.[8a]

In 1917 this bill was passed by the Michigan Legislature and became the present One-Man Grand Jury Law. It authorizes a single judge to act as a Grand Juror in place of the 23-Man Grand Jury".

The key that unlocks such power is supplied by section 3 of Chapter 7, ante, the provisions of which are published in the petitioners' brief, pp. 26-28 and need not be repeated here.

If upon the judicial inquiry provided in § 3, the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, 'he may cause the apprehension of such person or persons by proper process and, upon the

---

[8a]

Proceedings of the 26th annual meeting of the Michigan State Bar Association, 1916 pp. 101-115, at 103-105.

return of such process served or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint'.[9]

Witnesses who neglect or refuse to appear upon summons of the one-man grand jury 'or to answer questions . . . . material to such inquiry' may be punished for contempt,[10] though the sentence imposed may in judicial discretion be commuted or suspended if the witness appears and answers such questions [Stat. Ann. § 28.945].

And under the provisions of § 6 of chapter 7 of the code [Stat. Ann. § 28.946], a witness who answers questions which might tend to incriminate him, *is granted full immunity* from prosecution for any offense concerning which he testifies.[11]

3

Purposes for which Michigan one-man grand jury is employed.

It is at least worthy of note that the one-man grand jury

---

[9]

Also, if so satisfied, the justice or judge shall report the matter to the proper officials to the end that any public officer so accused may be removed from office. These are all considered to be 'judicial acts'. In re Slattery, 310 Mich. 458; cert. denied, 325 U.S. 876.

[10]

Such a proceeding in contempt is deemed criminal in nature. In re Wilkowski, 270 Mich. 787. See: In re Ward, 295 Mich. 742; In re Cohen, 295 Mich. 748; and In re Slattery, supra.

[11]

This section of the code is in recognition of the state constitutional mandate that 'no person shall be compelled in any criminal case to be a witness against himself' (Mich. Const. 1908, article 2, § 16).

law has been called into play in Michigan only when considered necessary to the public interest, or where it was deemed important to investigate wide-spread corruption in high places. A few examples will suffice:

Thus, in a comparatively early case, a one-man grand jury investigated a rather vicious combination in restraint of trade intrastate.

People v. Butler, 221 Mich. 626.

The law in question was later used to investigate, charge, and convict[12] a former mayor of the city of Hamtramck, high-ranking police officers of that municipality, and the proprietors of houses of prostitution, of a common-law conspiracy[13] to obstruct justice by wilfully and corruptly permitting and allowing them to operate.

---

[12]

To say that this state law is used to 'convict', simply means that testimony of witnesses who appeared before the one-man grand jury, and, under compulsion of the fear of punishment for contempt, admitted their own guilt and implicated others, is adduced through the same witness at the trial unless he becomes wholly recalcitrant. The law is thus made an effective instrument for evoking the truth. For, by way of analogy, 'a state may control such situation in accordance with its own ideas of the most efficient administration of criminal justice. The purpose of due process is not to protect an accused against a proper conviction'. Adamson v. California, supra.

[13]

Common-law conspiracies are punishable under § 505 of the Michigan Penal Code (Stat. Ann. § 28.773) which makes it a felony to commit any indictable offense at the common law, 'for the punishment of which no provision is expressly made by any statute' of the State.

People v. Tenerowicz, 266 Mich. 276.

It was employed to investigate, charge, and convict the members of a legislative committee and others who attempted to conduct a recount of votes cast for candidates for state office, of a common-law conspiracy to violate provisions of the State's general election law,

In re Investigation of Recount, 270 Mich. 328;

People v. O'Hara, 278 Mich. 281.

Such a one-man grand jury investigated corrupt practices in Wayne county and charged the prosecuting attorney and his chief investigator, the sheriff and his deputy, together with the operators of houses of ill fame and other illegal enterprises, with a common-law conspiracy to obstruct justice by engaging in a 'protection money' scheme, and the defendants were later convicted,

People v. McCrea, 303 Mich. 213; cert. denied (October Term 1942, No. 651), 318 U.S. 783;

People v. Wilcox, 303 Mich. 287; and cases in sequence.

The same basic conspiracy was involved in a later group of cases where a one-man grand jury indicted and the State prosecuted and convicted the proprietors of gambling enterprises (numbers and mutuel), a former mayor of the city of Detroit and other law-enforcing agents, of a com-

mon-law conspiracy to obstruct justice by means of systematic bribery,

People v. Roxborough, 307 Mich. 575; cert. denied, 323 U.S. 749; and see cases in sequence, including

People v. Ryan, 307 Mich. 610, and *People v. Reading*, 307 Mich. 616.

The same one-man grand jury, investigating corruption in the county of Wayne, charged, and the people convicted police officers of the city of Detroit, the secretary of the mayor of that municipality (People v. Reading, *supra*), and the proprietors of 'hand books', of a common-law conspiracy to obstruct justice by means of 'protection money' or bribery.

People v. Heidt, 312 Mich. 629;

People v. Bartlett, Reading et al., 312 Mich. 648, and cases following in sequence.

Such a grand jury investigation resulted also in the indictment of the mayor of Hamtramck for a conspiracy with other named defendants wilfully and corruptly to assist and enable the maintenance and operation of houses of ill fame and gambling establishments in that city, and thus to obstruct justice. Conviction was reversed for error in the charge of the trial judge,

People v. Kanar, 314 Mich. 242.

And, finally, a one-man grand jury in the county of Ingham (Lansing, the capital) indicted, and a petit jury

convicted a member of the state senate and another of a criminal conspiracy to corrupt the legislature of the State of Michigan.

People v. Delano et al., 318 Mich. 557, cert. den. 334 U.S. 818.